Date: January 2, 1998

Case Nos.: 97-CAA-2 and 97-CAA-9

In The Matter Of:

PAUL BERKMAN
Complainant

v.

U.S. COAST GUARD ACADEMY
Respondent

For the Complainant:
Scott W. Sawyer, Esq.
New London, Connecticut

For the Respondent:
William G. Haskin, Esq.
Norfolk, Virginia

Before:
DAVID W. DI NARDI
Administrative Law Judge

RECOMMENDED DECISION AND ORDER

This is a proceeding under the Clean Air Act , 42 U.S.C. 7622; the Federal Water Pollution Control Act or Clean Water Act, 33 U.S.C. 1367; the Toxic Substances Control Act, 15 U.S.C. 2622; the Comprehensive Environmental Response, Compensation and Liability Act, 42 U.S.C. 9610 and the Solid Waste Disposal Act or Resource, Conservation and Recovery Act, 42 U.S.C. 6971 (collectively referred to as the whistleblower statutes) and the implementing regulations found in 29 C.F.R. Part 24. An initial complaint dated September 18, 1996 (ALJ EX 1), identified as 97-CAA-2, was filed by Complainant pursuant to the aforementioned whistleblower statutes. This complaint alleges Respondent retaliated against the Complainant for reporting the North Site when it revoked Complainant's signature authority and told Complainant that he was no longer the Academy's Environmental Engineer in retaliation for Complainant's reporting to the Connecticut Department of Environmental Protection (hereinafter CT DEP) an area of land known

as the North Site. A subsequent complaint dated February 3, 1997 (ALJ EX 26) was filed by Complainant and has been identified as 97-CAA-9. (ALJ EX 27) This complaint alleges continuing harassment based on Complainant reporting the North Site, which harassment culminated in a January 8, 1997 Notice of Proposed Removal.

A hearing was held by the undersigned Administrative Law Judge in New London, Connecticut on August 25 - 29 and September 2 and 4, 1997. This Judge, having duly considered all the evidence of record, hereby **RECOMMENDS** that the Respondent be found to have violated the whistleblower statutes and that Respondent be **ORDERED** to remit damages, as specified in Section III of this Recommended Decision, to Complainant.

Post-hearing evidence has been admitted as follows:

CX 118	Complainant's Compliance With Court Order with	11/02/97
CX 119	Letter dated October 30, 1997 from Sylvia Rasie, APRN enclosed	11/02/97
CX 120	Complainant's Post-Hearing Brief	11/12/97
EX 11	Respondent's Post-Hearing Brief	11/12/97

The record was closed on November 12, 1997 as no further documents were filed.

I. Summary of the Evidence

This case focuses around an area of land known as the North Site. It is located at the U.S. Coast Guard Academy, and is owned by the U.S. government. The North Site is comprised of two parcels of land, both of which are located on the Thames River at the north end of the Academy. One parcel is located north of the Thames Shipyard and the other parcel is located south of the shipyard and north of the Academy's rowing center. (EX 11) The witnesses at hearing referred generically to the North Site, and it was clear that they were speaking of the area located between the shipyard and the rowing center. (TR 301) The surface area was described as strewn with metal scraps, timber, metal cans, glass, rusted metal,

and a vegetation-less plateau of sand. (TR 468) There was also visible sand blast grit and an abandoned oil truck.

In the summer of 1992, workers[1] from the Academy's grounds shop unearthed barrels on the North Site. (TR 122-123, 317-318) One witness described a barrel from which he saw and smelled a noxious smelling liquid emanating (TR 161, 174) and another specifically testified that he brought the North Site to the attention of various supervisors in 1992. (TR 294-295) He also recalled Lieutenant Commander Smith going to the North Site and the fact that he never generated a report as to his observations. (TR 295) A test of the area was done in 1992, although the grounds shop was not informed of the test results until 1996. When informed of the results, however, one witness stated the lead values seemed extremely high. (TR 163)

There was significant activity on the North Site in the spring of 1997. (See Generally CX 27) Witnesses described many men in white uniforms and air masks who worked in the area for at least a week digging up earth and dumping it in long dumpsters that were then hauled away. One witness, Mr. Earl Marek, whose testimony is summarized below, surmised that the environmental crew was searching for the drum that Mr. Marek had dug up in 1992. Mr. Marek further described two large holes, one which appeared like a big, deep crater that had a keel in it. (TR 305)

Mr. Paul David Berkman, who was retained as Environmental Engineer, GS-819-12, worked at the Academy from October 1993 until February 1997. The parties have stipulated to Complainant's background in the environmental compliance field, which is supported by Complainant's testimony as to his education and professional experience and by Lt. Opstrup's testimony as to the extent to which he relied upon Complainant for information and expertise. (TR 449, 470, 565-569, 575-576) It is appropriate, however, to pause to briefly note the extensiveness of Complainant's experience in the area of environmental compliance because it bears on the reasonableness of his belief that the North Site had to be reported. Complainant has a bachelor of science degree in biochemistry and a masters in chemical engineering. He has done some graduate assistantships in chemistry and has been published. He has taken "dozens and dozens of environmental courses, so numerous" he just could not remember them all at hearing, but described them as compliance programs for a number of different environmental statutes, including the RCRA, CERCLA, TSCA,

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[1]One worker testified he wore no special protective gear when working in the area and that he had no specialized training to work there. (TR 134-135)

CWA, and CAA. (TR 565-566) Among other professional experience, Complainant was an Environmental Protection Specialist covering solid waste issues at Chief Naval Operations at the Washington Navy Yard; an Environmental Engineer at Naval Facilities Engineering Command; and a Chemical Engineer, responsible for chemical process work at an activity level, at the Naval Warhead Station, Indian Head. (TR 566-569; CX 21) Chemistry was essential to these various positions because each required familiarity with chemical terminology. As this Judge noted at hearing, the evidence is clear in establishing that Complainant was a hard working, conscientious individual who attempted to do his job.

Lt. Timothy Opstrup, presently employed by General Electric as a commodity sourcing engineer, has a degree in civil engineering from the Coast Guard Academy and was an environmental officer from July 1995 through 1997. As an environmental officer, Mr. Opstrup had to keep the Academy in environmental compliance and he was assisted by Complainant, whom he described as a "great resource for answering questions." (TR 449) Indeed, Mr. Opstrup's reliance upon Complainant was so great that Complainant had to help him decipher the lab results commissioned by Mr. Frey. (TR 470) Lt. Opstrup recalled that Complainant raised concerns over the document and that he recommended that the Site be reported and that the legal office was consulted and it determined that the Site did not have to be reported. The Site was put on backlog to clean up in the future. (TR 471)

Complainant was the only environmental engineer at the Academy and, as such, he was required to ensure environmental compliance. (TR 1016-1017) Indeed, Captain Florin testified that Complainant was responsible as the "technical expert" at the Academy to maintain and ensure environmental compliance and to advise his superiors as to their projects' compliance. (TR 1048-1049) Complainant's Position Description[2] (CX 7) for his position at the Academy summarized that Complainant would be "responsible for the activities of the [Respondent] to ensure compliance with all applicable environmental regulations and design criteria." Complainant took the "ensure compliance" language very literally and was of the opinion that it meant that he was going to ensure compliance by recommendations, resolutions of problems, and actions.[3] (TR 582) Complainant testified factor 6[4] meant to

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[2]Lt. Opstrup reviewed Complainant's position description (CX 7) and stated he was unaware of any limitations placed on the position summary.

[3]Lt. Opstrup stated that the language in Complainant's position description regarding ensuring environmental compliance

Complainant that he had the right, pursuant to his job description, to contact people inside and outside the Academy. (TR 583) From his past experience, Complainant stated that if he could not contact and talk with people outside the Academy, he would not be able to get his job done. (TR 583)

An understanding of the Academy's chain of command is essential to an understanding of this case, for it is this chain of command that allegedly frustrated Complainant's performance of his duties as environmental engineer. The chain of command is used for grievance purposes and/or to communicate a concern to one's supervisor. One witness noted that in order to get past one's immediate supervisor with a concern, you would probably have to file a grievance. Complainant's chain of command proceeded as follows: his first line supervisor was Lieutenant James Keith Ingalsbe, who was later replaced by Lieutenant Timothy Opstrup; his second line supervisor was Mr. Greg Carabine; his third line supervisor was the facility engineering chief, Commander Bellona, who was later replaced by Commander Jeffrey A. Florin[5]; his fourth line supervisor was the assistant superintendent, Captain Laraby, who was later replaced by Captain Olsen, then by Captain Florin; and his fifth line supervisor was Admiral Paul E. Versaw. While this was the line of command "on paper," there was testimony that Mr. Carabine had a habit of running things directly. (TR 351)

There was also a great deal of testimony as to Mr. Carabine's management style, a style which is relevant to the issue of whether Complainant was being treated differently than other Academy employees and whether or not the animosity between Complainant and Mr. Carabine is attributable to Complainant's protected activity. Mr. Carabine was described as someone who yells frequently, is "by nature abrasive," and as someone who is "pretty rough with most folks." (TR 485, 549, 864)

Captain Florin described Mr. Carabine's management style as stern or strict. (TR 1012) In the Captain's opinion, Mr. Carabine

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meant that the employee had to notify the office up through the chain of command. (TR 540)

[4]Factor 6 indicates, among other things, that "outside contacts regularly include Federal, State and local agencies..." (CX 7 at p. 5)

[5]Commander Florin is now Captain Florin and shall be so referred to in this Recommended Decision and Order. His status at the time of the incidents in question, however, was that of Commander.

treated everyone in the office equally. The Captain testified that Complainant appeared "intimidated" by Mr. Carabine's management style (TR 1013) and that the two of them definitely did not get along well. In fact, on March 21, 1996, Complainant informed Captain Florin that he could no longer work under Mr. Carabine. The Captain responded by stating he would reorganize the environmental office so that Mr. Carabine would have no authority over Complainant. (CX 48) This reorganization, however, never happened. There was also evidence as to at least one other occasion during September or October 1996 on which Complainant expressed concern about his professional relationship with Mr. Carabine to the Captain and informed the Captain that Mr. Carabine was harassing him. (TR 1013) The Captain testified, however, that once he and Complainant discussed the conduct, they basically agreed that it was "rude behavior." (TR 1013) The Captain instructed Mr. Carabine to keep a little distant from Complainant. (TR 1014)

As far as concerns Complainant's relationship with the Captain, Lt. Opstrup stated that although he never noticed any tensions between Complainant and Captain Florin, he is sure that Complainant perceived some. (TR 549) In this regard, a March 14, 1996 e-mail from Captain Florin to Lt. Opstrup (CX 19) reflects the Captain's perception that Complainant and a fellow employee had spun up the idea that the Captain was Attila the Hun. According to Lt. Opstrup, however, the Captain did not treat Complainant differently than he treated everybody else. (TR 549) Lt. Opstrup stated he did not personally have any problems with Complainant, although he offered the opinion that Complainant was not "very apt to trying to listen to the other side" once he made up his mind (TR 518) and that Complainant had a hard time getting his knowledge across without appearing confrontational. (CX 116, at p. 56)

Complainant would make his recommendations to ensure compliance up through his chain of command.[6] Complainant described

[6]In this regard, Complainant noted it was very, very inefficient management of the environmental office to have an inexperienced person like Lt. Opstrup as a buffer between Complainant and his second line supervisor. (TR 587-588) The Captain recalled discussing with Complainant that the environmental office would be reorganized (TR 1024) and that Complainant asked a few times, beginning in or around September 1995, to have regular meetings with regard to environmental issues. (TR 1047)

"many, many recommendations that were ignored consistently"[7] (TR 587) and his frustration that clear cut compliance issues were not handled properly. Complainant stated there may have been a few recommendations of his that were followed after a lag and some resistance, but most of them were not. (TR 587, 790) Complainant is aware that environmental issues were backlogged and requests for funding were made. Complainant is aware that there were, at times, trouble getting money. (TR 793) Complainant also states, however, that most of what he asked for did not present a funding issue. Furthermore, funding and fund prioritizing should have nothing to do with reporting an environmental site. (TR 828-829)

Sometime in 1994, while Complainant was familiarizing himself with the Academy, he discovered a preliminary assessment of the North Site that was done in 1993 and a copy of the sampling results that Attorney Doug Frey, Complainant's predecessor in the environmental compliance area, had initiated sampling of in 1992. (TR 597) (CX 28c)[8] Complainant knew in 1994, upon reviewing these documents and actually going down to the North Site and observing sandblast grit, that a reportable quantity had been exceeded. (TR 598-599, 708) Consequently, Complainant drafted an October 18, 1994 memorandum to Lt. Ingalsbe (CX 30a) advising that the North Site was required to be reported pursuant to CERCLA. Complainant also provided a letter to comply with the reporting requirement (CX 28d), which was re-drafted a number of times. (CX 28e; CX 28f[9]) The letter was never approved and never sent out of the Academy. Complainant testified he also made Captain Florin aware of his opinion that the North Site should be reported very shortly after the Captain's arrival at the Academy. (TR 1027)

The Captain, however, testified he made inquiries and determined, upon evaluation of the advice, that the Site need not

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[7]Complainant acknowledged one particular compliance issue which was acted upon, but noted it was only after a lag and resistance. (TR 587)

[8]Complainant stated the handwriting on that exhibit was probably not there when he first saw the document.

[9]Complainant's draft of the reporting letter was returned to him with comments written in red in the margins. Lt. Ingalsbe told Complainant that the handwriting was that of Admiral Versaw. (TR 477, 601) Lt. Opstrup testified that the Admiral never asked Lt. Opstrup if there was a basis for the statements or for supportive statements or for dates. (TR 480)

be reported.[10] (TR 1030) Specifically, the Captain arrived at his decision that the Academy did not need to report the North Site based on the sample results and the regulations. (TR 1025) The Captain denied Complainant's suggestions that the Site was not reported because the Academy feared fines or adverse media coverage or because the Captain feared his career was at stake. The Captain also denied that the decision had anything to do with a cover-up. He did, however, admit to telling Complainant that the Academy did not have the same resources as the Navy, a statement which inferentially refers to a funding issue. The Captain admitted at hearing, however, that funding is not an excuse for not reporting an environmental waste site. (TR 1031)

Complainant also expressed to the Captain his concern about personal liability for failure to report the North Site. (TR 1034) The Captain, however, never considered this fear as a contributing factor to Complainant's sporadic work schedule. Instead, the Captain asked Complainant whether he knew anyone who had actually been put in jail for an environmental violation, but denied asking Complainant whether or not Complainant really thought that could happen to him. (TR 1037) The Captain does not recall telling Complainant that he should not be losing sleep over the North Site, but does recall stating that he, the Captain, would take the blame. (TR 1037) The Captain explained this statement was made in the context of his explaining to Complainant that the Academy made the choice on all the evidence it had and despite Complainant's recommendations.

The Work Environment

Complainant conducted quite a bit of hazardous material (hereinafter HAZMAT) training in 1994, which he testified was eventually cut back by Captain Florin, who allegedly told Complainant that he did not want Complainant doing the training anymore. (TR 594-595) Complainant recalled speaking with Mr. Chuck Carey, a grounds shop employee, about the North Site during one of these meetings. Complainant recalled being concerned about the possible immediate threat to people and the environment. Complainant also recalled Mr. Carey's concerns about possible exposure. Complainant testified that he approached Lt. Ingalsbe "immediately" after that conversation and that Lt. Ingalsbe stated

[10]Fuss & O'Neill, an environmental consulting firm, was called in to double check the Academy's determination that the Site did not need to be reported. (TR 1054) A document prepared by Fuss & O'Neill describing the differences between the reporting requirements was received at the Academy in September 1996. (TR 1039-1040)

he was aware of the drums at that location. (TR 596) The Lieutenant allegedly assured Complainant that the situation had been taken care of (TR 596) and that was the end of the conversation.

Mr. Charles Carey, who has a Bachelor's degree in metallurgy, the science of metals, continues to be employed by Respondent as a gardener leader. According to Mr. Carey, Complainant's position as the person in charge of hazardous material control was developed "in the early 1992 period after [the Respondent was] threatened with fines for having hazardous materials around the Academy that were uncontrolled." Mr. Carey recounts, in Admiral Versaw's words, that since the Academy was "negligent" in the environmental compliance area, the Admiral decided to beef up hazardous material control. (TR 118) Lt. Ingalsbe was made the officer in charge and Complainant was brought in for his technical expertise.

Mr. Carey believes he was labeled a troublemaker for bringing a number of different matters to the Respondent's attention and/or to the attention of other appropriate authorities when the Respondent would not respond. (TR 146-147) Mr. Carey has filed 12-14 grievances over six years; in his own words, "more than anyone else, I'm sure." (TR 165) Mr. Carey does not recall being yelled at concerning the North Site. In fact, Mr. Carey does not recall that he ever asked to have the North Site cleared; although, he notes, he often expressed safety concerns and hazardous material concerns during his six-plus years at the Academy. (TR 140-141)

Mr. Carey first became familiar with Complainant in the Spring of 1993 when Mr. Carey attended a HAZMAT training seminar. Mr. Carey asked Complainant, at the time of this training seminar, whether Complainant was aware of the area where he and co-workers had unearthed barrels. Mr. Carey stated he was sure that he encountered Complainant at yearly training sessions and that he mentioned the North Site to Complainant every time. Complainant has expressed concerns to Mr. Carey about the North Site. (TR 134)

In March of 1996, Mr. Carey was at the North Site and noticed the fence he had been instructed to raise and the signs he had been instructed to hang[11] (CX 113), were gone. He brought this to Lt. Opstrup's attention (CX 112) and was instructed, in April 1996, to reinstall the fence and signs as they had been before. (CX 56)

[11]Captain Florin recalled that in the summer of 1996 there was discussion about the proper wording to be put on the sign to hang at the North Site, which resulted in the word 'contaminated' being removed, and whose signature should go on it. (TR 1047)

In June of 1996, Mr. Carey and a fellow employee had occasion to be in Captain Olsen's office for a meeting. At the end of that meeting, the other employee raised the issue of the North Site. Mr. Carey recalled "Captain Olsen was very upset that we brought the subject up." (TR 151)

There was another meeting, HAZMAT refresher course (TR 145) or training session led by Complainant on or about May 30, 1996. Eric Adams, one of Mr. Carey's fellow gardeners, raised a question in regards to the North site and the potential contamination employees might have been exposed to while working there. (TR 143) Mr. Carey recalled Complainant informed the employees during that meeting that the lead value was 2,000 parts per million and that this value exceeded the allowable limit. (TR 143) Mr. Carey did not get the feeling that Complainant was trying to make himself the hero and slam management. (TR 188) All of Mr. Carey's knowledge about the North Site, which he acquired during the training sessions, is from Complainant. (TR 181)

The next day, May 31, 1996, there was a meeting in Mr. Opstrup's office concerning the North Site. (TR 146; CX 62) Complainant was a totally changed person within a few weeks after that meeting. (TR 183, 191)

Mr. Eric Roy Adams, another grounds shop employee, first met Complainant in 1994 when they were formally introduced during HAZMAT training. (TR 199) During the last HAZMAT training that was conducted by Complainant, which was held sometime in 1996, Mr. Adams asked Complainant a question concerning the 55 gallon drum or barrel he had previously dug up[12] and was informed that the levels of lead were high. Mr. Adams had previously posed questions to NLC people, an acronym left undefined, people Mr. Adams described as from Governor's Island or Virginia, and was privately informed that 'chances were' that nothing down there had affected his health. (TR 203)

Mr. Adams recalled that Mr. Carey questioned Lt. Opstrup about the barrels in the end of 1995 and that he never got a straight answer. Mr. Carey got a letter back and was led to believe the

[12]When Mr. Adams dug up the drum, he smelled a definite odor, a very strong smell. (TR 204) Mr. Adams continued to dig and he hit another drum. His supervisor instructed him to stop digging while he went to speak with his supervisors. When the supervisor returned, he instructed Mr. Adams to cover-up the drums. (TR 204) Approximately two weeks expired and Mr. Adams was instructed to return to the area and to dig the barrels up again. Again, he was instructed to bury them and erect a fence.

Site had been turned in to the state or DP. Mr. Adams did not raise the North Site issue again until he was in Captain Olsen's office. Mr. Adams described Captain Olsen as becoming "uptight a little bit." (TR 205) The Captain commented that there was not enough money to dig up the Site, and this concerned Mr. Adams because on the one hand he had people telling him there were no health concerns and on the other hand he was being told it would cost substantial money to clean it up. (TR 205-206)

Mr. Earl Marek, who works in the grounds maintenance crew at the Academy as a gardener and HAZMAT coordinator and who is president of the union, also testified at hearing. Mr. Marek, who first remembers Complainant at the Academy in late 1994, or early 1995, testified the HAZMAT training was a new initiative which was taught by Complainant. Mr. Marek recalled an early 1994 HAZMAT meeting during which he did not broach the subject of the North Site. He did, however, recall that Mr. Carey brought it up and that Lt. Ingalsbe, who was in charge of the training meeting, looked to Complainant because Complainant had the experience and expertise. (TR 280)

After April 1996, Mr. Marek spoke with Captain Olsen, assistant superintendent at the time, about the North Site because he "wasn't getting no answers from command." (TR 298) Mary Hafey, civilian personnel specialist, was also present. Mr. Marek was informed that there was nothing at the North Site and that there was no need for him to worry. Captain Olsen invited Mr. Marek to go down to the Site with him and his lawyer to take a tour around. Mr. Marek responded that if the Captain was bringing his lawyer, Mr. Marek would also bring one. The tour never took place.

Mr. Marek described Complainant as being very "frank" during the May 30, 1996 HAZMAT meeting, so frank in fact that Mr. Marek "knew [Complainant] was going to get himself in trouble." (TR 284) Mr. Marek indeed commented to his people that "it's all over for him now" because Complainant's supervisor had been present at that meeting.[13] (TR 284)

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[13]At the subsequent meeting with the grounds shop, which Complainant indicated was apparently ordered by the command to try to smooth things over, Complainant continued to hold his grounds. He was honest, and he did not withhold anything from the shop. Complainant stated the Lieutenant apologized after attending the second meeting for himself and Complainant stated this may have been because he realized Complainant was not inciting them, he was merely answering their questions honestly. (TR 704) From this point on, however, Complainant was restricted from giving training by himself and Lt. Opstrup's attendance was

Shortly after this training course, a meeting between Lt. Opstrup, Complainant, Mr. Charles Carey and Mr. Marek was held. In regards to this meeting, Mr. Marek recalled the discussion concerned the North Site and employee potential exposure while there. Lt. Opstrup explained there should be no concern because there were no airborne particles flying around and there would be no problem posed by simply driving past the area. (TR 314)

Mr. Marek, who has a blood disorder that was discovered two years ago (TR 307), has requested that the people working on the North Site have blood samples drawn and be tested for lead. Subsequent to that request, Mr. Marek was informed by a Mr. Donald Van Dyke that if there had been exposure, the lead would most likely have settled into the body's organs by now. Therefore, the whole body should be subjected to medical monitoring. (TR 309) Mr. Marek discussed this with Complainant at some time during Complainant's employment at the Academy, although he has not informed anyone in the chain of command of this illness. Mr. Marek testified the union is concerned with whether its people have had their health contaminated through any chemicals or elements in the North Site area.

Captain Florin was aware that the grounds crew had become incited over the North Site. The Captain, who was upset that the crew was getting excited about something that happened three or four years earlier (TR 1044), had a meeting with Lt. Opstrup in this regard. Lt. Opstrup authenticated CX 76 as his handwritten notes, probably drafted probably in August 1996, in response to a HAZMAT meeting with the ground shop. The document refers to reporting the North Site and expresses the reasons why the Lieutenant was unhappy with Complainant's incitement of the workers in the grounds shop. (TR 536) The notes also express the concern that Complainant was throwing fuel on a volatile group, failed to mention positive steps taken by Academy in regards to the Site, and that Complainant tried to make himself the hero while slamming management. Lt. Opstrup also questioned Complainant's agenda. Mr. Opstrup recommended sending an e-mail up the chain of command recommending that the North Site be reported. (TR 536)

Complainant described Lt. Opstrup as "infuriated" during the meeting about Complainant's incitement of the grounds crew. (TR 702) The Lieutenant was mad and yelling, accusing Complainant of inciting the grounds shop and making a current problem worse. The basis of it was that Complainant had done something that command did not want done. Complainant stated he was already on his way to a major medical, nervous breakdown and this scolding by the

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required.

Lieutenant did not help.

The documentary and testimonial evidence presented at hearing established Complainant's repeated and unheeded requests for action on environmental compliance issues. An August 23, 1996 memorandum from Complainant to Captain Florin, via Lt. Opstrup and Mr. Carabine, exhibits the frustration Complainant was encountering. (CX 75) In paragraph 3, Complainant writes "Your lack of support for Environmental Office RCRA enforcement policy is a major factor in continued noncompliance at the Academy." Complainant's concerns about environmental compliance being frustrated by the organization of the environmental office can be traced as far back as a memorandum dated September 1, 1995 (CX 31), which Complainant testified was prompted by a lot of frustration about compliance and which was Complainant's attempt to try and break through the roadblock he had been faced with. A meeting was held two weeks after this September 1995 memorandum and no action was taken to correct or improve the concerns expressed. (CX 32)

A November 17, 1995 memorandum from Complainant was another effort to get past the stonewalling he was faced with, such as Captain Florin's statements that there were insufficient funds. (TR 614; CX 32) This letter was followed by a November 20, 1995 meeting between Complainant, Captain Florin, Mr. Carabine and Lt. Opstrup. Complainant was told that the meeting was to go over Complainant's job elements, which Complainant stated had been cut back. This cut back resulted in a lot of stress to Complainant because the cut back restricted his control over implementing compliance programs. When Complainant got to the meeting, the door was closed and Mr. Carabine started "screaming" at Complainant about Complainant going behind his back, making Complainant feel like a "lamb to slaughter." (TR 616) Mr. Carabine stated he was going to sue Complainant and that he would spend thousands of dollars to do it. Complainant turned to Captain Florin for support, and received none. (TR 616-617) In fact, Complainant claims the Commander stated he should sue Complainant too, but Captain Florin denied ever making this statement. (TR 1012) Complainant retorted he would sue both of them. Complainant knew, at this point, that he was in "serious trouble" and attributed the threats to sue to his elevating environmental issues. (TR 618, 826) Complainant left the meeting thinking that he was going to be sued by Mr. Carabine and Captain Florin for mentioning their names in a memorandum to try to get some attention from the assistant superintendent to correct a situation that had been going on for years. Complainant also thought he was going to be fired because of Mr. Carabine's statement to Complainant that he would be there long after Complainant was gone. (TR 619)

Lt. Opstrup, who had the opportunity to review Complainant's

memorandum to Captain Olsen, described it as “chewing up” Mr. Carabine. (TR 540) Lt. Opstrup attended the meeting in the conference room where “tempers flared” and stated that Mr. Carabine first threatened to sue Complainant for defamation of character and Complainant responded with a threat of suit, and it went back and forth for a while. The Lieutenant described an “uncomfortable, tense obviously” atmosphere. (TR 486)

It was around this time that Complainant spoke with Lt. Lennon, assistant legal officer, who listened to Complainant's situation and recommended that he speak with Commander Mackell. (TR 622) Complainant stated he spoke with Lt. Lennon on at least a minimum of two, perhaps three occasions, because he was “getting desperate for relief.” By the time of these conversations, Complainant stated he was “very uptight,” “very stressed.” (TR 623) He was having difficulty sleeping because he knew the next time he took an issue to the assistant superintendent he would be fired. (TR 623) During one of these conversations, Lt. Lennon told Complainant to keep quiet because they should not be discussing the issue “in the open.” (TR 624)

Complainant met with Commander Mackell on November 21, 1995. (CX 38) Complainant expressed his concerns about the mismanagement and poor organization of the environmental office. He also commented on the failure to properly address environmental concerns and Captain Florin's excuses for these failures, as related to Complainant during the November 20 meeting. (CX 38) Commander Mackell stated he would try to speak with Captain Florin.

Complainant assumes Commander Mackell spoke with Captain Florin because Captain Florin then called a meeting on November 21, 1995. (CX 36) It was agreed that nobody was going to sue, that weekly staff meetings would be held to continue the open communications and that Captain Florin would speak with Complainant about the environmental issues. (TR 490, 620-621) This meeting, according to Complainant, was much more “relaxed” and conciliatory. (CX 37)

A memorandum dated January 30, 1996 (CX 42), is from Complainant to Captain Olsen and was drafted because Complainant realized that the agreements made during the November meeting were not going to materialize. Complainant described the memorandum as another “plea” (TR 633) and testified he was “threatened” that he should not have elevated these issues to the Captain's attention. (TR 632) As of the date of this memorandum, Complainant was fearing personal and criminal liability. His predicament was succinctly stated, when he wrote “I am caught between a rock and a hard place. I have to make recommendations based on legal requirements to keep us in compliance. When these recommendations

conflict with management concepts I am accused of setting them up for taking the fall for future violations." (CX 42) Complainant felt he was going to lose his job and he was scared writing the memo because of the threats from Mr. Carabine and Captain Florin that they were going to sue him. (TR 633-634)

There was a January 31, 1996 meeting (CX 43) between Complainant and Captain Olsen and Complainant came away from the meeting not feeling very well because the Captain was not going to be of any help. Complainant was of the opinion that the Captain was either not informed or he was being misinformed. The Captain informed Complainant he would hold an environmental quality team meeting, but he never did so. (TR 636-637) Captain Olsen also told Complainant that Captain Florin would start paying more attention to Complainant and his environmental concerns once the Captain took care of other important matters. (TR 637) This concerned Complainant and increased Complainant's stress levels because the next person he could go to in his chain of command was the Admiral and, according to Complainant, he had already approached Admiral Versaw on a couple of other occasions and the Admiral did not "want to hear anything." (TR 638)

Complainant specified he attempted to speak with Admiral Versaw on three occasions. Complainant recalled he informed the Admiral that he had exhausted the chain of command and that he was being harassed and that people were making his life miserable. The Admiral declined Complainant's plea for help and informed him to go back through the chain of command. (TR 639)

During a March 20, 1996 meeting with Fuss & O'Neill (CX 48; CX 50), an environmental consulting firm, Commander Mackell informed Lt. Opstrup and Complainant that they had fulfilled their duties by reporting up the chain of command. Complainant had a different opinion as to whether the reporting obligation had been satisfied. Complainant perceived that he was informed that if he "were to take the initiative of reporting this release myself, it would be looked upon unfavorably by the command." (CX 50)

Complainant started to open the meeting and Mr. Carabine interrupted him and indicated that the professionals, referring to F&O, should speak. (TR 658) Complainant stated he experienced more rude behavior at that meeting, abuse he calls it, and that he had never been subjected to that sort of thing before. After the meeting, the F&O people told Complainant that the North Site should be reported. They did not, however, tell this to the Commander during the meeting. (CX 54) Complainant attributes this to the fact that they "knew" what the Academy wanted to hear and to the fact that there was one more option year to their contract. (TR 660) In September 1996, Lt. Opstrup requested documentation of

that meeting and that recount, which Complainant described as generally correct and as the first written document from Fuss & O'Neill concerning the North Site, mentions nothing of a recommendation to report the North Site. (CX 89)

Complainant sent Commander Mackell a memorandum dated March 20, 1996 (CX 49) to commemorate the meeting because he felt threatened by Commander Mackell at the meeting. The memorandum recounted, among other things, Complainant's recollection that Commander Mackell told him that if he reported the North Site, it would be looked upon unfavorably by the command. Complainant recalled this statement was delivered sternly and that Commander Mackell was giving him a warning. In Complainant's opinion, Commander Mackell's arguments that there was no personal liability were erroneous and so it did nothing to relieve the stress that Complainant felt. In fact, it made Complainant feel worse because he was being given arguments that made no sense.

Commander Mackell responded by memorandum dated March 27, 1996. (CX 54) He explained the context of some of his statements and denied others. In response to Complainant's recollection about the chain of command viewing any report by Complainant "unfavorably," the Commander wrote "I object to this statement to the extent that Mr. Berkman is attempting to suggest that any threats were made or intimidation occurred." (CX 54) The memorandum concluded by recommending that Complainant not be allowed to conduct unsupervised meetings with contractor personnel due to his apparent lack of understanding of the procurement process. Never, prior to this date, had Complainant been told not to meet with contractors, which Complainant described as a necessary part of his job. (TR 692) Complainant disputed that he has a lack of understanding of the procurement process because he had experience in this area from the Naval Facilities Engineering Command and at the Academy and because, prior to this meeting, Complainant was allowed to interact with contractor personnel unsupervised. (TR 661; TR 693) The statement had a very detrimental effect on Complainant's job because it, in effect, took Complainant off a number of projects. (TR 693-694) Complainant stated he was accused of trying to make a contract at this meeting because if he had made such an attempt, he would then be prevented from interacting with contractors in his job. (TR 661-662)

Captain Florin did receive a memo, on or about March 27, 1996, from Commander Mackell recommending that Complainant no longer deal with outside contractors in an unsupervised manner. (TR 1026) Prior to receiving the recommendation, the Captain did not have concerns about Complainant's understanding of the procurement process. After seeing the document, he did. The Captain stated this change in how Complainant dealt with outside contractors did

not affect Complainant's job duties, only whether he could be with contractors alone or with someone else present.

In April 1996 there was a discussion between Complainant, Commander Mackell, and Captain Florin about reorganization of the environmental office or facilities and engineering. The reorganization, however, never took place and Complainant described an April 9, 1996 e-mail (CX 19) from Lt. Opstrup to Mr. Carabine as the "straw that broke the camel's back." (TR 696) Complainant, who had a very good feeling before he left to go on leave, was devastated when he returned to work and found out that Captain Florin had decided not to reorganize as promised. Complainant testified "It was like he could have shot me. ...the bottom fell out and that's when...I started suffering anxiety attacks." (TR 699) Complainant filed a discrimination complaint on April 24, 1996 and complained of Captain Florin's decision not to reorganize. The complaint was based on religion and reprisal. (CX 58) On May 1, 1996, Complainant complained of another act of reprisal (CX 59), his removal from the Tank Consolidation Project. He asserted that Mr. Carabine's actions were "clearly based on his personal hatred and bigotry." A June 20, 1996 conversation between Complainant and the EEO counselor indicated that Mr. Carabine wanted to apologize for the religious discrimination and that Mr. Carabine had informed the EEO counselor that Complainant was removed from the Tank Consolidation Project because he lacked the proper skills and training. (CX 64)

On August 21, 1996, Complainant sent a memorandum to Earl Marek (CX 72), in which Complainant reiterated his opinion that there was the potential for harmful health effects and stated that no one should be on the contaminated property without proper training and protective equipment. Complainant further wrote "any information given to you by any other source which contradicts the above does not represent my expertise or experience with uncontrolled waste sites."

The Letter to CT DEP

By the time of Complainant's departure from the Respondent, the Respondent wanted to keep anything to do with the North Site away from Complainant. Complainant testified the Respondent asked the representative from CT DEP to send correspondence in plain brown envelopes so that Complainant would not be able to identify it and, therefore, not try to get a hold of it. (TR 828) There was no action taken as a result of Complainant calling in the North Site (TR 1084), **i.e.**, the State never came out and looked at the Site and the Academy never received any fines or sanctions as a result of not reporting. (TR 1084)

Complainant testified the procedure for reporting a contaminated site is to call the National Response Center and report the site. The National Response Center might call the Marine Safety Office (hereinafter MSO), depending on where the site is and the Center might instruct the caller to report the site, in writing, to the State. (TR 727) Complainant testified he called the National Response Center[14] on Friday, August 23, 1996 and it instructed Complainant to report, in writing, to the State.[15] (TR 727-728) The clerk at the National Response Center elicited general information from Complainant and informed him that he/she was going to inform the MSO because of the location of the Site and that the MSO might contact Complainant for more information, which it did. (TR 730, 732) The MSO also directed Complainant to send a written report to the State.

On this same day, Complainant spoke with Mike McCain, CT DEP Waste Management Bureau, and Mr. McCain instructed Complainant as to the correct address to send the letter. (TR 730) (CX 74) Complainant believes a lady at the remediation branch told Complainant to report to the State in writing. Again, she never asked him if he was reporting in his official or personal capacity. (TR 799) Complainant summarized his conversation with Mr. McCain in a memorandum to Lt. Opstrup. (CX 74)

Later that day, there was a closed door meeting between Lt. Opstrup, Mr. Carabine and Captain Florin. Complainant had drafted a letter to the State for Captain Florin's signature because he wanted to protect the Academy from possible liability. (TR 732-733) Complainant gave the draft to Lt. Opstrup, who returned it to Complainant after the meeting, stating that neither Captain Florin nor Mr. Carabine would sign it. Lt. Opstrup also informed Complainant that he could not or would not sign it. (TR 733) Complainant testified that he then stated he would have to sign it and Lt. Opstrup did not try to stop him. I note this testimony is consistent with Lt. Opstrup's previously submitted affidavit. (CX 109) Complainant's personal notes, however, indicate Lt. Opstrup told Complainant that Complainant would have to sign the letter and Complainant stated he would since everyone else refused. (CX 73) Also on August 23, Complainant wrote a memorandum to Lt. Opstrup and Mr. Carabine regarding compliance issues and reiterates that

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[14]Complainant testified that calling the Site in was part of his job. (TR 731)

[15]Complainant informed the clerk at the National Response Center of his identity and where he worked. The clerk never asked whether Complainant was calling in his professional capacity or as an individual. (TR 798)

lack of support is a major factor in continued noncompliance. (CX 75)

Complainant felt "relieved" that a report was finally being made (TR 735) and sent his letter dated August 26, 1996 to the CT DEP. (CX 77) The letter, which was sent on U.S. Coast Guard letterhead and is signed "P.D. Berkman, Environmental Engineer, U.S. Coast Guard Academy," informs the State that the Site was reported to the Waste Management Bureau, which instructed "us" to bring the information to the State's attention. Later in the letter, Complainant writes "The Academy intends to investigate these sites further to determine any risks contaminants might pose to the environment."

On August 27, 1996, Complainant was called into a meeting with Captain Florin, during which he was reprimanded for reporting the North Site. (TR 735-736) (CX 73) The Captain told Complainant he went against the command and that the Captain was mad. Complainant recalled that the Captain's hands were shaking, that the Captain was trying to control himself and that the Captain accused Complainant of stabbing him in the back. (TR 736, 738) Complainant stressed that he was legally obligated to report the Site and the Captain told him he was not a responsible person. The Captain then told Complainant he "was not to write any letters, memos, anything that went outside of the immediate facility's engineering office."[16] (TR 811) Complainant contends that from August 27 forward, he was not able to sign any documents going outside the immediate facility engineering office and this curtailed his ability to deal with issues that needed immediate attention. (TR 739) The Captain also made a statement to the effect that there could only be one voice coming out of the office and that it was not going to be Complainant's. (TR 737) Complainant interpreted this as the Captain stating that his job was going to be very, very restricted because Complainant would no longer have all the communications that he needed. The Captain also told Complainant that he could no longer call himself the Academy Environmental Engineer. (TR 738) According to Complainant, this took away whatever authority Complainant had in dealing with the shops. After the meeting, Complainant told Lt. Opstrup that he would be reporting directly to DEP any time he saw a contractor illegally generating waste. (CX 73)

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[16]According to Complainant, Captain Florin definitely told Complainant not to sign things going outside the office. Complainant notes that even if he said "division," the effect is the same, in that it curtails Complainant's effectiveness in his job. (TR 832-833)

At the time of this meeting, Complainant testified he was "fairly well broke." (TR 740) He was on medication to try to correct the damage already done, **i.e**, his diagnosed major depression and the meeting worsened an already bad medical condition.

Captain Florin, formerly facility engineer at the Academy from July 1995 through July 1997, stated he has seen Complainant's letter to CT DEP (CX 77) and that he had a meeting with Complainant on August 27, 1996 in regards to that letter. The Captain, who was aware that Complainant reported the North Site by telephone and that a letter was being prepared on August 23, did not tell Complainant not to send the letter to CT DEP. (TR 1060) He attributes this to the fact that he did not think the letter would go out and his intent was to meet with Complainant to discuss the circumstances of Complainant's concerns.[17] When he met with Complainant on the 27th, however, it was too late. During the meeting on the 27th, the Captain and Complainant discussed the fact that the Captain thought a lot of progress had been made in the environmental program, that Complainant did not have signature authority, and that Complainant did not have authority to send documents outside of the Academy.[18] (TR 1001)

The Captain recalled making the stabbing gesture and stated it was in relation to Complainant sending the letter when the Captain thought progress was being made. (TR 1002) The Captain was convinced of the Academy's progress and Complainant sent the letter before the two of them really had a chance to discuss it. According to the Captain, he thought Complainant was "completely going around the chain of command." (TR 1003) (See Also Captain Florin's affidavit at CX 109)

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[17]The Captain, however, had been informed that Complainant had called in the North Site. He had no intention of signing the draft letter. (TR 1069) Neither the Captain nor Mr. Carabine would sign it because they were of the opinion that there was no need to report the Site. (TR 1070) The Captain eventually ended up sending a letter to the State "to focus the state's attention to" the Captain's "office on what we were doing with regard to the North Site." (TR 1073)

[18]The Captain testified he thought Complainant understood what he meant when he told Complainant that he did not have signature authority to send correspondence outside the Academy (TR 1003) and that Complainant did not indicate otherwise and did not ask any question as to what was meant.

The Captain stated he did not inform Complainant that he was no longer the Academy Environmental Engineer. He did, however, state to Complainant that he should be careful as to how he was representing himself to outside agencies. The letter made it look like the Academy position that there was a reportable site. (TR 1004)

The Captain testified he did not indicate to Complainant that he did not have authority to sign documents within the facility engineer office or within the Academy. He recalled that Complainant indicated Lt. Ingalsbe had allowed him to do so, and the Captain informed Complainant that the Lieutenant was no longer his supervisor and that he did not have such authority. According to the Captain, only he and Mr. Carabine had authority to sign documents addressed to individuals outside the Academy. (TR 1005) The Captain testified he would have called a similar meeting if he had seen any other letter similarly signed by Complainant on letterhead. (TR 1005) Prior to August 27, 1997, the Captain never told Complainant not to sign documents. (TR 1033) Prior to the CT DEP letter, the Captain does not know if Complainant was previously allowed to send letters on Academy letterhead, signing his name. (TR 1061) After August 27, 1996 Complainant was not allowed to write on Academy letterhead, signing his name.

The Captain had discussions with Lt. Ingalsbe after July 1995 about Complainant's signature authority (TR 1015) and was informed that Lt. Ingalsbe allowed Complainant to sign transmittal memos. (TR 1062) The Captain had no knowledge of whether those transmittal memos identified Complainant as Academy Environmental Engineer or how the signature appeared. (TR 1016) He also stresses that there is an important difference between internal memorandums and letters going outside the Academy. (TR 1036)

By memorandum dated August 29, 1996 (CX 78), Complainant advised Captain Florin via Lt. Opstrup and Mr. Carabine, that Complainant had reported the North Site to the National Response Commission and CT DEP without the Captain's consent. Complainant expressed distress at the inability of the Captain to interact with Complainant on a professional level and Complainant's opinion that the Captain's lack of respect for Complainant's experience and position is intolerable. Complainant further stated it is clear that the Captain's acts of limiting Complainant's signature authority and taking away his title, as discussed during the August 27th meeting, were "reprisal." Complainant refused to further meet with the Captain unless certain requests were met. Complainant requested that the Captain document in writing those directions he gave at the meeting, and stated that "until you do I will consider the preceding [sic] nonbinding."

The evidence of record establishes that there was never an issue about Complainant signing memorandum to persons within the Academy.[19] (TR 740) (See Also CX 31; TR 611; CX 32, TR 613; CX 42; TR 632; CX 49; TR 655-656; CX 71; TR 722; CX 72; TR 726; CX 74; TR 731-732; CX 75) Complainant testified that he kept file cabinets of his records within his cubicle area at work, as well as a bookcase full of documents he generated, reports, and information from agencies. (TR 683) As of Complainant's last day at the Academy in December of 1996, those cabinets were still in his cubicle area. (TR 683)

Furthermore, Complainant testified "There were hundreds of things" with his signature on it; some of those letters were mailed outside of the Academy and some of those letters were written on Academy stationery. (TR 684, 830) Nobody told Complainant prior to August 1996 that he could not mail things outside of the Academy and, in fact, Lt. Ingalsbe was aware that Complainant communicated outside the Academy and had "no problem" allowing Complainant to do that. (TR 684) At the time of hearing, Complainant had no idea of where all of these documents were. (TR 685)

Complainant's testimony is corroborated by that of Ms. Beverly Campbell, a secretary at the Academy, who stated she saw some of Complainant's memos or letters because sometimes she would distribute them to different people at the Academy such as the hazardous waste coordinators, Captain Florin, Captain Olsen, or even the State. Ms. Campbell also recalled that some of the letters went outside the Facility and Engineering Office. (TR 874) Ms. Campbell stated she has seen other documents signed the same way as the letter that went to CT DEP, although she does not know whether they were dated prior to or after that letter or who these letters would have gone to. (TR 901)

According to Ms. Campbell, Mr. Carabine was going through the cabinets after Complainant left the Academy. She does not,

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[19]Indeed, this Judge notes the September 12, 1996 letter to Section Chief, Emergency Response Section, for an environmental determination. (CX 83) The letter is signed "P.D. Berkman, Environmental Engineer, U.S. Coast Guard Academy." The initial draft, intended for Mr. Carabine's signature by direction of the Superintendent, was refused by the command. There is no evidence of record that Complainant was counseled about his title and/or signature authority, despite the fact that this letter is signed nearly identical to the letter which was sent to the CT DEP. I also note, however, that this letter was not sent on Academy letterhead.

however, recall any documents leaving Complainant's cubicle. Ms. Campbell had no knowledge of the location of those file cabinets at the time of hearing. Ms. Campbell, who keeps an open access file of all environmental correspondence, was asked by Respondent if she had any environmental letters. Shortly before hearing, an employee from the Academy went through all her files "going crazy" looking for a letter that was supposedly written to the State DEP, although she does not know by whom, in January 1997. (TR 913)

Complainant candidly admits that he never had by direction of authority. (TR 778, 830-831) According to the Captain, the letter sent by Complainant to CT DEP did not state that he had by direction of authority. (TR 1061) Therefore, the testimony from all witnesses as to precisely what by direction of authority is and whether the letter amounted to an exercise of it, is irrelevant. There was, however, testimony as to the existence of an office policy for letters going outside the Academy. This unwritten policy required the letter go through Captain Florin or Mr. Carabine. (TR 544)

Complainant's testimony that he signed letters going outside the Academy on letterhead is controverted by Lt. Opstrup, who testified that although it was not a problem to sign internal memos and manifests[20] (TR 542-541), Complainant was not allowed to sign documents going outside the Academy on Respondent's letterhead. Complainant explained that he went through Lt. Opstrup sometimes in communicating with the shops because it was a matter of convenience and it would help the Lieutenant understand what was going on. (TR 811) The Lieutenant, who is not aware of Complainant previously using Respondent's letterhead, held the opinion that it was not appropriate for Complainant to send this letter with the title he used or on letterhead. (TR 543)

Similarly, Lt. Ingalsbe, formerly Chief of the Environmental Section at the Academy, testified that he never authorized Complainant to sign external correspondence. (TR 970) There were documents that Complainant signed that went outside the office, the Lieutenant simply asked that they be routed through him. Lt. Ingalsbe did recall seeing miscellaneous internal documents signed

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[20]A hazardous waste manifest is a receipt that indicated that identified waste was sent to a specified location offsite. As part of these manifests, an individual was required to certify that he or she is working on a waste reduction program, that it is done to the best of his or her knowledge, and that he or she is trying to reduce the waste that is produced. Complainant had authority to sign these manifests, which are "serious" documents. (TR 513)

by Complainant while he was Complainant's supervisor. He did not, however, recall seeing Complainant's signature on any external correspondence other than transmittal letters[21] (TR 869, 975) and stated that Complainant would have had no occasion to sign documents on Academy letterhead with by direction of authority.[22] (TR 981) While the Lieutenant admitted that he never directly told Complainant not to sign documents, he also stated that he was "fairly confident" that he and Complainant discussed the office procedures.

No where in Complainant's position description does it specifically grant Complainant the authority to sign any documents. (TR 778; CX 7) Similarly, no where does it state that he cannot sign any documents. Complainant stresses that Lt. Ingalsbe told Complainant that he could sign documents going outside the Academy. (TR 778) Complainant later qualified this statement, however, when he testified that Lt. Ingalsbe "didn't stop [Complainant]" and that "[the Lieutenant] probably knew about it." (TR 793, 830) Complainant interpreted this as an indication that he had the authority to so sign. Complainant is not aware of any other person within his chain of command being aware that he was signing correspondence going outside the Academy.

This Judge notes that Complainant was issued a meritorious rating on job element 2 in his April 1995 performance appraisal (CX 24), wherein Lt. Ingalsbe noted in particular "[Complainant's]...interactions with representatives from the" CT DEP and the EPA and the April 1996 appraisal (CX 25a), in which the Lieutenant noted that Complainant "effectively communicated with the DEP and our contractors on the requirements to complete the projects."

Attorney Douglas Frey, who is presently employed as a civil engineer by the U.S. Coast Guard Department of Transportation and who has had environmental training in certain matters (TR 328-329), has worked at the Academy for the past ten years and testified that there was an "abrupt"change in his duties in 1992. (TR 331, 416-417) At that time, Mr. Carabine instructed Mr. Frey, a self-described environmentalist, that he would no longer be performing

[21]Transmittal letters are not official Academy correspondence, they are like a fax cover sheet. (TR 984-985)

[22]The Lieutenant cannot recall seeing any such documents signed by Complainant. (TR 974)

the environmental facet of his position.[23] As HAZMAT officer, Mr. Frey had occasion to report concerns to the CT DEP and/or the EPA. Mr. Frey had called the hotline to let them know he had done everything he could to convince the command to do what had to be done and the agency then sent an inspector over to the Academy. The CT DEP never asked Mr. Frey for anything in writing and he never, of his own initiative, followed up with a writing. (TR 389-390)

Mr. Frey testified it was not enough for one man to do the environmental compliance work at the Academy, especially as he was "doing battle" to do the right thing with the leadership at the time. (TR 334) In Mr. Frey's opinion, the Academy seized an opportunity to remove him from his hazardous material duties and replace him with "someone who would pursue the Academy's interests rather than" his own concerns as an environmentalist. (TR 332) There was a lot of friction between himself and upper management over anything to do with the environment. (TR 333) In particular, Mr. Frey noted this friction in the context of when an issue was about to go outside of the Academy; in other words, when someone was about to rock the boat. (TR 333, 401) Mr. Frey described an environment where it was priority to keep all problems "inside" and to keep quiet. (TR 333, 347, 401) Mr. Frey stated environmental matters did not make the list of priorities for the chain of command.[24] (TR 342)

While Mr. Frey was operating the hazardous material section at the Academy, he signed two types of documents, hazardous waste manifests and a Form 1348, which was a form sent from the Academy to the submarine base in an effort to get rid of hazardous waste. (TR 352-353, 384) Mr. Frey was told that he could not sign any documents without sending them through Mr. Carabine. (TR 353) If Mr. Frey had signed something, other then the aforementioned, and sent it out, he would have had to have answered for it. (TR 384) Mr. Frey does not recall relaying this rule to Complainant, although it might have been possible that he did. Mr. Frey described the rule as "common knowledge" because nobody could send

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[23]Mr. Frey testified his environmental duties were the same as those subsequently performed by Complainant. Complainant performed a "piece" of his prior responsibilities. (TR 373)

[24]In this regard, Mr. Frey recalled a sizeable oil spill caused by a U.S. Coast Guard cutter on a Sunday which was Earth Day, in an unspecified year, that nobody did anything about, despite the presence of numerous Academy personnel. A non-employee reported it and an oil skimmer came in to remedy the situation. (TR 342-343)

things out of the office. (TR 354, 385, 397-398) Not only was it common knowledge, but Mr. Carabine had directly told Mr. Frey not to send anything out without his signature. Mr. Frey doubts that Complainant would have any authority to sign any documents.

Mr. Frey's office was located in close proximity to Complainant's office and he stated he observed Complainant's relationship to his supervisors on occasion. Mr. Frey described the relationship as "not fun" and not that professional. (TR 399) Complainant had a lot of trouble with Mr. Carabine, such that Mr. Frey described it as obvious to the whole office. (TR 400) Mr. Frey stated these problems were rooted in Complainant's effort to bring the Academy into compliance and the resistance he was getting from Mr. Carabine. (TR 400) Mr. Frey described a specific example of a meeting in 1996 where Mr. Carabine tried to interfere with Complainant's ability to "get the word out" on how to deal with hazardous materials and that Complainant was not going to take it sitting down. (TR 402)

Mr. Frey, who initiated the taking of samples and conducting of a lab report on the North Site, did not obtain permission for the tests because he was not sure that anyone would authorize it. (TR 357-358) He received the lab results (CX 28c[25]) sometime shortly after October 8, 1992, which results indicated to him that the area was hazardous and indicative of a CERCLA issue, rather than an RCRA issue. (TR 381) Mr. Frey, who specifically told Mr. Carabine that the North Site was contaminated and who was aware that there was personal liability for his responsibilities as hazardous materials officer (TR 362), went through the chain of command as far as the lab results were concerned because he was "directed," by Mr. Carabine, "not to have any contact directly with the DEP." (TR 411-412) Mr. Frey is of the opinion that the results should have been reported to somebody, either the EPA of the CT DEP. Mr. Frey authored a memorandum prior to 1993, at the behest of Admiral Kozak,[26] listing things that were not in compliance and included the North Site on this list. (TR 362-363,

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[25]The handwriting on CX 28c does not belong to Mr. Frey. (TR 355-356, 380) Unmarked copies of the lab result are at EX 9 and EX 9b. Mr. Frey also testified that the testing company called him to tell him of a mistake in the lab results, although he cannot recall which is the correct result as between EX 9 and EX 9b. Regardless, Mr. Frey testified, the lead level in either document indicates a CERCLA site. (TR 394)

[26]There is some discrepancy as to whom the memo was written for. (TR 365) (**Cf.** 362-363)

374)

Mr. Carabine, who is presently Mr. Frey’s direct line supervisor, has yelled at Mr. Frey for calling the DEP for assistance in getting the Academy to do “the right thing with the environmental program.” (TR 349) According to Mr. Frey, Mr. Carabine was upset that an unspecified environmental issue had gotten out and he was not happy that someone else was now going to be dealing with it. (TR 349) This Judge, upon observing Mr. Frey's demeanor at hearing and considering that he had no apparent personal interest in the outcome of this litigation, found Mr. Frey's testimony to be credible in all regards and I specifically credit his testimony on this point. Mr. Carabine, who would have been the appropriate person to testify to the contrary, did not appear as a witness at hearing.

Lieutenant Christopher N. Zendan, Public Affairs Officer at the Academy, is aware of the North Site and testified that he has had no contact with Complainant and had not even seen him until a television interview a few days prior to his testimony. (TR 922, 929) As the Public Affairs Officer, Lt. Zendan deals with the media, the community and the internal organization of the Academy and acts as a spokesperson for the Superintendent or the Academy. The Lieutenant first became aware of an environmental issue at the North Site in September 1996 when he was called to a meeting with the Assistant Superintendent, Captain Olsen; the Command Legal Officer, Captain Mackell; and the Facilities Engineer, Captain Florin. The subject of the meeting was that Complainant had sent a letter and possibly made a phone call to Federal, as well as State, agencies concerning the North Site and that this had the possibility of attracting press attention. There was a subsequent meeting during which Captain Florin and Captain Mackell presented information to Lt. Zendan concerning the Academy's position that the North Site was not a toxic waste site, and the findings and results upon which the Academy based its position that it was not a reportable site. This statement about the site being non-reportable, however, did not appear in any newspapers. (TR 928)

The Lieutenant testified he released only verbal statements about the North Site, as opposed to written or faxed information. Captain Olsen expressed concern to the Lieutenant that in dealing with the press, due respect should be shown to Complainant. In no way were there to be statements made to the effect that Complainant was lying. (TR 941) Accordingly, Lt. Zendan would respond to inquiries with something to the effect that the Academy believed Complainant did not have complete information or that there were inaccuracies in the information he had. Lt. Zendan stated there is no need and no intention to retract any statements that Lt. Zendan has made. (TR 936)

Lt. Zendan confirmed the information he was given by contacting the Facilities Engineer as well as requesting that the correct terminology be verified with Fuss & O'Neill. The Lieutenant stated he was informed by Captain Florin that Complainant was "unavailable" due to medical reasons. (TR 934) Lt. Zendan was making statements to the press while Complainant was still employed at the Academy, even though the Lieutenant has not had any particularized training in the area of environmental compliance. (TR 934)

Complainant's Request to Amend his Job Elements

On or about November 20, 1995, Complainant asked Lt. Opstrup to change his job elements. (**See Generally** CX 34) It is important to have the job elements accurately reflect the work actually performed for appraisal purposes. Complainant made this request because he was concerned about his performance ratings, which might be low based on his not performing all the duties in those elements. He maintained that he could not perform those duties, however, because of restrictions placed on him by the chain of command. Lt. Opstrup stated Complainant probably did not want to be held responsible, accountable through his work or personally liable, for something that was written as a job element that he was not doing. Although Complainant stated he was concerned about being rated on job elements for which he was not being allowed to perform, he stated that he was never actually rated on those elements. (TR 784-786)

Lt. Opstrup wrote to Complainant concerning his job elements on December 4, 1995 (TR 504; CX 39) and the job elements were not officially changed until after April 1996. This gap of time between the first request to change them and when they were actually changed was attributed to the fact that Lt. Opstrup had given them to Captain Florin for feedback and it was a while before he received any. (TR 505)

Complainant received a proficient on his first performance appraisal in June 1994 (CX 23) and a meritorious on his April 1995 appraisal. (CX 24; TR 589) Complainant testified Lt. Opstrup marked Complainant meritorious on his last appraisal for the period of April 1, 1995 through March 31, 1996, but that Mr. Carabine reviewed it and lowered it to proficient. (CX 25; TR 718) Complainant spoke with Lt. Opstrup, who then approached Mr. Carabine, who then changed the mark back to meritorious. (CX 25a; CX 67) Complainant and Lt. Opstrup reviewed Complainant's job elements in June 1996 and Complainant chose not to sign the changes until his last performance rating was received. (CX 26) A June 20, 1996 memorandum from Lt. Opstrup to Miss Hafey in Personnel (CX

22) explained the Lieutenant's failure to issue a mid-year evaluation of Complainant. He attributes the failure to management oversight caused by an adjustment to Complainant's critical elements, which adjustment was not approved until the period was almost over. On July 3, 1996, Complainant informed the Lieutenant that he was not able to perform or accomplish his projects and tasks assigned on the April 1, 1996 through March 31, 1997 appraisal due to his medical condition. (CX 61) Complainant requested another adjustment to his job elements to comport with his reduced work schedule.

Complainant's Request for Religious Leave

On March 15, 1996, Complainant requested religious leave because he did not have enough accrued leave time to take off the upcoming Jewish holiday. (TR 645, 690-691; CX 47; CX 58) Complainant recalled that Lt. Opstrup had no problem with it, but that he initially heard back that Mr. Carabine would not approve it. This hit Complainant "like a ton of bricks." (TR 646) Complainant felt angry and retaliated against, he felt this was a "low blow" and that Respondent was now discriminating against him because of his religion. (TR 647) Complainant was allowed to get this time off, but only after Miss. Hafey was involved and there was an incident between Complainant, Mr. Carabine and Captain Florin. (TR 647) Mr. Carabine informed Complainant that he did not think Complainant could take advance compensatory time and asked Complainant to prove to Mr. Carabine that Complainant could do that. (TR 647) Captain Florin walked on the scene and stated the Academy does not allow leave for religious holidays. Complainant described that the two were speaking to him with "pure hatred."[27] (TR 648) Complainant stated this retaliation was because, among other things, Complainant was trying to report the North Site and that his "health was definitely starting to suffer at this point and [he] was developing the symptoms for which [he]...was going to seek eventually psychotherapy..." (TR 650)

Lt. Opstrup, who recalled the religious leave issue, attributed the issue surrounding Complainant's requested leave to the fact that Complainant did not have any leave time to take, and was required to take the time as compensatory time. (TR 523-524)

[27]CX 59, dated May 1, 1996, further complains of Mr. Carabine reducing Complainant's responsibilities in regards to the Tank Consolidation project and states "this is again clearly based on [Mr. Carabine's] personal hatred and bigotry." (CX 59)

Complainant's August 4, 1994, request for leave to observe religious holidays (CX 30) was approved, although Complainant cannot recall by whom, and Complainant was granted a combination of the three types of leave: annual leave, leave without pay, and compensatory leave. According to Complainant, he probably did not request religious holiday leave in 1995 because he had enough leave to cover it. Complainant testified he had no problem during his entire 12 year career with the U.S. government in taking holiday leave. (TR 591)

Ms. Campbell, who is responsible for keeping the time cards, recalled Complainant's request for religious leave in March 1996. (TR 860) Ms. Campbell testified she and Complainant were discussing Complainant taking compensatory time for the holiday when Captain Florin "rudely interrupted" them. (TR 860) She described the Captain as having a very mean look on his face and stating that Complainant could not take the compensatory time. (TR 861) Complainant and Ms. Campbell were "kind of stunned." (TR 861) Then Mr. Carabine came into the area and offered some words, although Ms. Campbell cannot recall what they were. Ms. Campbell recommended that Complainant contact Mary Hafey to find out if he could take the leave as he wished. Eventually, Complainant was granted the leave, although he had to make up the hours on certain days with a supervisor present. (TR 862) (CX 53) Ms. Campbell testified it is not usual to require a supervisor to be present; although upon cross-examination it was revealed that she only knows this through word of mouth. (TR 862, 896)

Complainant filed a complaint of religious discrimination on or about March 22, 1996. (CX 52) There was a meeting with the EEO representative and the North Site was discussed. (TR 528-529) Complainant stated Mr. Carabine required Complainant to make up the compensatory time the following week after normal work hours, which Complainant stated Mr. Carabine knew was inconvenient because of Complainant's child-care requirements (TR 687), and he prohibited Complainant from making up the time on Saturdays. Two other employees, who were non-supervisory, were being allowed to work Saturdays. (TR 688) Complainant stated the Academy eventually "backed down" (TR 688) and assigned specific Saturdays on which Complainant could make up the time. (CX 53) Complainant, however, further complained about Mr. Carabine trying to designate specific Saturdays on which he could come in, contending that religious holiday leave had been turned into "detention." (CX 53)

Complainant's Request to Work at Home

When Complainant began working his part-time schedule in April 1996, he requested to do work at home and based that request on the

fact that he had done work at home on several occasions under Lt. Ingalsbe's supervision. (TR 652; CX 66; CX 68) There is some evidence that Complainant's request for an adjusted work schedule was viewed with some skepticism by Respondent. In this regard, Complainant interpreted the statements written by Lt. Opstrup in a June 24, 1996 e-mail to Miss Hafey (CX 19) as untrue because they seemed to indicate to him that there should be some kind of compromise regarding Complainant's work schedule, and there could not be. At the time of the e-mail, Complainant had been diagnosed with major depression and was under doctor's orders to restrict his work schedule. Complainant had provided the Respondent with medical records at this time, he was not asked to see another Doctor, and no one indicated they questioned Dr. Okasha's notes. (TR 707) Complainant also documented a July 25, 1996 discussion he had with Lt. Opstrup, during which Lt. Opstrup told Complainant that Captain Florin and Mr. Carabine expressed doubts about whether Complainant actually wanted to work. (CX 66)

Mrs. Berkman testified Complainant had been allowed to perform work at home in the past and that he was compensated for that work with compensatory time. (TR 81, 95, 97-98) According to Complainant, he could perform the majority of his responsibilities at home. (CX 47; TR 651, 653, 788)

Every time Complainant submitted a request to do work at home in March, April and May 1996, while he was under the supervision of Captain Florin, the request was denied. (TR 653) Complainant testified that all he wanted to do at this time was work and that he asked Lt. Opstrup to reapproach those persons who were making the decision that Complainant could not work at home. (TR 720; CX 66) On the one hand, the Academy was stressing critical compliance issues, and on the other hand, it refused to let Complainant work at home. Complainant stated this was putting a lot of pressure on him and that it was detrimental to his health. According to Complainant, there was "no excuse in the world" for not allowing Complainant to do work at home and he noted that he carried a beeper, issued by facilities engineering, so that he could be reached at any time in case of an emergency. The evidence further revealed, however, that Complainant did not usually carry the beeper all the time and that he did not take it home with him.

According to Complainant, the Respondent presented shifting reasons for not allowing Complainant to take work home. (CX 93) In this regard, Miss. Hafey initially informed Complainant that employees who do take work home, do not get paid for it. Complainant spoke with Mr. Zimba in contracting and found out that he took work home and got paid for it. Complainant returned to Miss. Hafey with this information, and she then stated that it was due to contracting's specific job description. (CX 93)

Lt. Opstrup recalled a time that Complainant requested he be allowed to complete work at home and that this request was never allowed while Lt. Opstrup was environmental chief. (TR 538) It was denied because it was not Academy policy, even though there was some work that Complainant could have done at home. The request was further denied because Complainant was working a reduced four hour work day as directed by his physician.

Lt. Ingalsbe testified that on a few occasions, Complainant was permitted to take work home in order to meet pressing deadlines. It was done at the Lieutenant's request and Complainant was either paid or given compensatory time. There was a time that Complainant had to take some time off for personal reasons and Complainant offered, in an effort to mitigate his absence, to take work home. He was not permitted to do so. (TR 972) Lt. Ingalsbe testified the office policy really did not allow employees to take work home.

Captain Florin is not aware of anyone who was allowed to take work home. (TR 1009) In response to Complainant's requests to re-approach this issue, Lt. Opstrup requested the Captain to allow Complainant to do work at home and the Captain denied that request. (TR 1082)

To the extent that Complainant offers this minimal evidence that he was, on some occasion, allowed to complete assigned tasks at home to buttress his argument that Respondent should have, in March, April and/or May 1996, allowed him to regularly complete a majority of his work at home on a regular and extended basis, this Judge is unpersuaded. The evidence establishes that Complainant's work at home was, at best, infrequent, granted only upon the request of his supervisor, and generally looked upon with disfavor by the Academy. Furthermore, the extent of work which Complainant sought to do at home, in his own words the majority of his responsibilities, coupled with the indeterminate length of this request, created a seemingly unprecedented situation.[28]

Complainant's Absent Without Leave Status

Complainant was sporadic in his attendance in the weeks following the time he first applied for leave under the Family Medical Leave Act (hereinafter FMLA) in or about April 1996.

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[28]The record lacks evidence of any similarly situated employee. I briefly pause to note the evidence that a Mr. Zimba from contracting was allowed to perform work at home and hasten to add that the extent of that work and the regularity with which it was performed at home is unspecified.

During this sporadic schedule time, Lt. Opstrup, without first consulting Complainant, approached a Doctor at the Academy and questioned him about Complainant's medical condition and medications. The Doctor, who never examined Complainant, was asked questions pertaining to technicalities about the diagnosis and medication, not about Complainant personally. (TR 554) Lt. Opstrup was informed that the medications should not affect Complainant's ability to get up in the morning or his concentration. (TR 554-555) This, together with the fact that Complainant was able to get up and get to work early on a day when the President was speaking, influenced Lt. Opstrup's perception of Complainant's medical condition.

Over the course of the next few months, there were a number of requests for doctor's notes from Complainant because the Academy did not get all the information it wanted. (TR 546-547; EX 5) On August 8, 1996, Lt. Opstrup requested certain information, such as diagnosis and prognosis, from Complainant in order that the Respondent could properly evaluate his request for a reasonable accommodation. (CX 70) By memo dated August 30, 1996, Complainant supplied Lt. Opstrup with medical documentation in order to prevent being placed on absent without leave status, or AWOL, for August 29. (CX 79) The documentation indicated that Complainant could not work full-time, that he was on Prozac, and that his prognosis was good with continued treatment. The Doctor was unable to state when Complainant would be able to resume a full-time work schedule. The memo also reiterates Complainant's willingness to complete critical work outside of the office.

In response to this memo, Lt. Opstrup informed Complainant by memorandum dated September 5, 1996 that a 4 hour per day temporary work schedule would be established that would continue through September 29, 1996. (CX 80) The Lieutenant later indicated a willingness to work with Complainant's medical restrictions by adjusting the four hour work schedule to allow for a one hour lunch break. (CX 82) Lt. Opstrup clearly stated his goal to return Complainant to his essential position on an eight hour work schedule to meet the office's demands. Lt. Opstrup again requested a prognosis and informed Complainant he would require medical certification for sick leave and leave without pay. By memo dated September 25, 1996, the Lieutenant reminded Complainant of the need for updated medical documentation regarding Complainant's adjusted work schedule. (CX 87) Complainant supplied a brief letter from his Doctor. (CX 88)

Complainant's reduced work schedule had a negative impact on Lt. Opstrup's office because Lt. Opstrup had a lot of questions that he could not get answered quickly and he had to take on a lot

of the day-to-day tasks. (TR 548) Complainant's reduced work schedule resulted in a reduced work load for him, but only because there were not enough hours in the day to get everything done. Lt. Opstrup recalled that there were months that Complainant was not at work at all before his disability was approved. (TR 551)

In September 1996, there was an office meeting during which the office leave policy was discussed. Mr. Carabine and all the staff of the facilities engineering office were present. It was during this meeting that Mr. Carabine verbally explained what Complainant refers to as a new policy regarding leave, which is discussed below. (TR 745) A memorandum dated September 25, 1996 (CX 86), reiterates the office policy that required an employee to continue up the chain of command when leaving work early and reminded Complainant that he was required to comply with that policy.

Lt. Opstrup sent Complainant a memo dated September 20, 1996 (CX 85) concerning Complainant's failure to work within the set four hour per day work schedule. (TR 802) The insistence on the specific time frame was justified by the Lieutenant stating he needed to know when Complainant would be in the office so that the Lieutenant could set meetings, etc. Complainant was informed that any future tardiness may be recorded as AWOL which can be grounds for dismissal. (TR 749) Complainant described this rule, which applied to everyone who was not a supervisor (TR 806) and which was related to Complainant after he had reported the North Site (TR 836), as ridiculous because he could be late for reasons unrelated to a medical condition, such as a flat tire. He also notes that he has never been required, in his entire career as a government employee, to submit medical documentation. Mr. Carabine, in uncharacteristically compassionate remarks to Complainant, later indicated to Complainant that he would speak with the Lieutenant regarding Complainant's adherence to a specific schedule. (CX 90)

On October 23, 1996, Lt. Opstrup informed Complainant that he had exceeded his FMLA leave (CX 91) and that the Lieutenant had to make a determination as to whether or not Complainant could continue on in a part-time status in the critical position, for which it is essential to have a full-time employee. The Lieutenant states Complainant's schedule has been a hardship on the organization and again requests specific medical documentation regarding Complainant's prognosis. Complainant provided the documentation by letter dated October 31, 1996 (CX 96), which indicated that the Doctor was unable to determine the date on which Complainant would be medically capable of returning to full-time

employment with the Academy.[29]

A November 4, 1996 letter from Dr. Okasha indicated

5. Full or partial recovery is not expected under the current circumstances at his job.

6. The impact of the medical condition on the job is that patient is unable to work full time or perform his duties as the condition leaves him fatigued, depressed and with poor concentration. The impact of the condition off the job is that employee has developed a sleep disorder and lacks ambition and motivation.

7. The patient has shown no improvement over the course of 20 weekly sessions of psychotherapy, and being limited to part time work of no more than 20 hours per week. The employee show (sic) signs of lack of ambition and motivation, hypersomnia, generalized pain, tiredness, anhedonia, and total lack of concentration.

8. The patient will definitely suffer incapacity because of his medical condition which is precipitated by the situation at work.

9. Given the stress and harassment the patient is experiencing at work this situation will lead to the worsening of the patients anxiety and depression.

10. I have recommended that the patient work part-time to lessen the severe stress that is engendered by the situation at work which has already caused severe anxiety, extreme fatigue, poor concentration, insomnia, poor appetite and depressed mood for Mr. Berkman.

(CX 101)

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[29]The letter specifically stated that "With treatment and decreasing stress in his environment, specifically at work, the prognosis is fair to good....To continue work part-time and allow patient to finish his work at home. Patient is not able at this point in time to work on a full time basis given the adversarial situation presently at his job." (CX 96)

Complainant was given AWOL on October 16 and 17, 1996 (CX 94) for his failure to produce medical documentation and a meeting between Complainant, Lt. Opstrup and Mr. Carabine followed on October 24, 1996. (CX 93) Complainant described the AWOL slips as "a threat of action" for which he received no adverse disciplinary action, such as a letter of reprimand or a suspension.[30] (TR 803) Complainant, who described Mr. Carabine as being very abrasive, explained his medical condition to Mr. Carabine and asked him to put the new policy in writing. Complainant filed a grievance regarding these AWOLs, and stressed that he spoke with the Lieutenant directly or left messages, and that he left messages for Mr. Carabine with Rhonda Gregor. (CX 92)

The Office Leave and Sign Out Policy was disseminated in writing to all Construction and Engineering Personnel by Mr. Carabine during a November 1, 1996 staff meeting.[31] (CX 95; CX 97) Complainant was disconcerted when Mr. Carabine handed him the written policy, which Complainant contended was not the same policy as had been verbally related to him and the other employees. Complainant testified that Mr. Carabine made a comment that the people who did not have work to do could stay after the meeting so that Complainant could ask them if they also perceived a difference. Complainant did remain after the staff meeting, and he testified the other employees also did not remember the policy as written.[32] Complainant stated Mr. Carabine stayed in the room while Complainant asked people and he was "intimidating" Complainant and other people by giving out this big laugh. (TR 752)

Complainant eventually returned to his work area and was speaking with Ms. Campbell and Lt. Opstrup when Mr. Carabine came over. Complainant stated Mr. Carabine was "obviously upset" and Ms. Campbell described him as "ranting and raving." (TR 752, 912) Mr. Carabine told Complainant he was just not recalling the verbal instructions correctly and Complainant stated he would not engage in an argument because of his "present state," a reference to his medical condition. (TR 753) Complainant did state, however, that

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[30]According to the Captain, AWOL is not a very, very strong disciplinary action. The Captain stated that it is described by civilian personnel as a timekeeping procedure where someone is absent without approved leave. (TR 1067)

[31]According to Ms. Campbell, the office leave and sign out policy as enunciated in the memorandum (CX 95) was a change in procedure. (TR 887)

[32]Ms. Campbell cannot recall if the written policy was the same as the verbally stated policy. (TR 887)

it was obvious to him that he was being retaliated against by being given AWOL. Mr. Carabine followed Complainant and started yelling at Complainant, stating it was insubordination that Complainant was walking away from Mr. Carabine while Mr. Carabine was trying to talk to him. (TR 754)

Mr. Frey recalled a discussion which occurred in 1996 concerning the office leave policy. Complainant had called in sick and left a message with a secretary because neither Mr. Carabine nor Lt. Opstrup were in. Complainant questioned whether this was a change to what had been the previous policy, and Mr. Carabine responded this was his meeting and that if Complainant wanted a meeting he could call his own. (TR 369) Complainant attempted to discuss whether this was a change in existing policy, and Mr. Frey described there was some "heat" about him doing this. (TR 369) "There was quite a bit of tension." (TR 370) In Mr. Frey's opinion, the memo did reflect a change in the existing policy. (TR 370-371) Mr. Frey described a recent day, sometime in July 1997, on which he was out sick and left a message with the Secretary. (TR 392) Mr. Frey was not given AWOL. (TR 392)

Complainant documented this staff meeting and the subsequent encounter in a November 4, 1996 grievance to Captain Olsen. (CX 97) The memorandum recounts Mr. Carabine accused Complainant of having selective hearing. Complainant also indicates he wrote to the Captain because Captain Florin has a lack of interest in correcting the problem, as exhibited by his refusal to take any action.

Complainant filed two grievances on his AWOLs (CX 92, dated October 25, 1996; CX 97, dated November 4, 1996), one of which was resolved by Complainant electing to proceed along an EEO route. (TR 1080) Captain Florin, who was assigned to resolve the November 4 grievance (CX 103), reached a different conclusion as to what happened when Complainant challenged Mr. Carabine on the leave policy during the meeting. (CX 107) According to the Captain's inquiries, observers described Complainant as interrupting the meeting and stated that they were taken off guard by his persistence. They also described Mr. Carabine as restrained and professional during the exchange, although some said he was visibly angry because he was being challenged by Complainant.

Ms. Campbell, who believes the new AWOL policy was instituted because of Complainant and that he was being set-up, testified she did not want to sign the timecards which placed Complainant on AWOL status. (TR 878) In fact, she told Mr. Carabine to sign the timecards himself, and Mr. Carabine "got really angry," such that Ms. Campbell was afraid she was going to be charged with insubordination. (TR 877) Eventually, she signed the timecards.

Although the AWOL policy is still in effect, Ms. Campbell states it is not used. (TR 879) Complainant still has AWOL on his record. (TR 880)

Ms. Campbell testified that Complainant was treated differently in regards to leave time. (TR 883) Complainant had to call Mr. Carabine directly. Other employees, those whom Ms. Campbell described as being in the good old boys club, were then and are allowed now to call in and leave a message. (TR 884) She admits, however, that everyone had to speak with Mr. Carabine directly after the second memo and that everyone followed the procedure for a little while. (TR 905-906)

Ms. Campbell does not know if Complainant was warned that he would be carried on AWOL for reporting to work late. (TR 903) No other individuals had been absent as frequently as Complainant. (TR 905) Steve Barney, a former employee, was similarly affected by the sick leave policy when he was carried AWOL in 1993. (TR 915)

In regards to office sign-out policy identified in CX 95, Complainant testified he was never required to comply with the sign-out policy prior to the meeting where Mr. Carabine disseminated the written memorandum. (TR 685) At that time, everyone was instructed it was absolutely mandatory to comply with the sign-out policy.

According to the Captain, the office leave and sign out policy was applied equally to every non-supervisor in the division. (TR 1010; CX 95) The Captain stated that the same basic policy had been in effect for years (TR 1010, 1011) and that the requirement to sign out would not have effected Complainant’s responsibilities in any way.

Complainant’s Notice of Proposed Removal

Complainant began the application process for disability retirement prior to November 6, 1996. (CX 99) The completed application, dated November 19, 1996 (CX 10), was based on Complainant’s condition that made it difficult for him to work and, since certain people at the Academy were continuing to harass Complainant and cause him further pain, on his Doctor’s recommendation that it would be better to apply than to be subjected to stress. (TR 754-755) In addition, Complainant was bearing in mind a conversation he had with Lt. Opstrup, during which Lt. Opstrup told Complainant that if he did not return to work within a reasonable time, the Academy would consider terminating Complainant. (TR 755) The Supervisor’s Statement, dated November 18, 1996 and completed by Lt. Opstrup in connection

with Complainant's disability retirement request, indicates that Complainant's conduct was satisfactory. (CX 9, section D, question 1) On January 8, 1997, Complainant added information to his disability retirement application. (CX 108) Specifically, he enclosed a December 5, 1996 and January 2, 1996 (sic) letter from Dr. Okasha, the latter of which stated that the Doctor had advised Complainant to remain out of work until February 3. Complainant was eventually granted permanent retirement disability under cover of letter dated February 10, 1997. (TR 756; EX 3)

Complainant's Notice of Proposed Removal, dated January 8, 1997 (CX 2), indicates a commandant instruction to eviscerate the procedures for issuing a notice of proposed removal. (TR 761-762) For example, Complainant had never been directly spoken to, besides 'innuendos' from Lt. Opstrup, about being removed from his job (TR 762) and nobody asked Complainant if he wanted a different job at the Academy or if he would take a reduction in pay. (TR 762)

Respondent's civilian personnel manual (CX 12), provides the procedure for issuing a Notice of Proposed Removal based on poor performance.[33] Where unacceptable performance serves as the basis for an employee's proposed removal, the manual requires the employee be counseled and those counseling sessions should be documented (CX 12, pp. 2-3 to 2-4) and that the supervisor should submit relevant information to the Civilian Personnel Office for review. Specifically, the manual requires, among other things, the Academy support its action by substantial evidence and allow the employee an opportunity to respond both orally and in writing. (CX 12, p. 2-8) Furthermore, any decision must advise the employee of his/her right to an appeal to the MSPB or other appropriate agency. (CX 12, pp. 2-9 to 2-10) The employee bears the burden of demonstrating that a medical condition exists, and the employer then must reasonably accommodate an otherwise qualified handicapped employee. (CX 12, p. 2-11) Significantly, the manual imposed upon the Respondent the obligation to provide Complainant, who had 5 years of service, information concerning disability retirement and provided that an application for disability retirement shall not preclude or delay any other appropriate personnel action. (CX 12, p. 2-11) The manual further provides an employee may volunteer to resign when confronted with a potential performance based action

[33]I pause to note that Complainant's attention at hearing was directed to the general policy section under disciplinary and adverse actions, the incorrect part of the personnel manual. Complainant's attention would have more appropriately been directed to the section regarding notice of proposed removal based on unacceptable performance.

and that it is permissible for management to tell the employee that a removal action is contemplated and that if he/she resigns before an action is proposed, no record will be made in the "OPF," which this Judge assumes refers to the official personnel file. It is not permissible, however, to coerce the employee to resign. (CX 12, p. 2-12)

According to Complainant, the Notice of Removal was withdrawn because the Academy gave Complainant an ultimatum, either he accept retirement disability or he would be removed from his position.[34] (TR 767, 772) Complainant chose retirement, although he did not want to go that route. Complainant stated he was never removed because he took "the less painful recourse." (TR 810)

Captain Florin testified the January 8, 1997 Notice of Proposed Removal (EX 4) was issued because Complainant was no longer a full-time employee. Complainant had, over the prior nine months, basically assumed half day schedules. The environmental section is small and the environmental engineer position is critical to maintaining compliance. (TR 1006, 1021) Despite Lt. Opstrup's repeated requests for a prognosis for recovery, there was never one given. (TR 1006-1007) The Captain did not consider a less severe action, such as reprimand or suspension, because the Academy was unable to obtain adequate medical documentation. (TR 1008) According to the Captain, Complainant's reporting of the North Site had nothing to do with Complainant's Notice of Proposed Removal (TR 1007), which would have been issued even if Complainant had not reported the North Site. (TR 1007)

II. Discussion

This case proceeded to a full hearing on the merits. Accordingly, examining whether Complainant has established a **prima facie** case is no longer particularly useful and this Administrative Law Judge shall consider whether, viewing all of the evidence as a whole, the Complainant has shown, by a preponderance of the evidence, that he was discriminated against for engaging in protected activity. **See Boudrie v. Commonwealth Edison Co.**, 95-ERA-15 (ARB 4/22/97); **Boytin v. Pennsylvania Power and Light Co.**, 94-ERA-32 (Sec'y 10/20/95); **Marien v. Northeast Nuclear Energy Co.**, 93-ERA-49/50 (Sec'y 9/18/95). To carry that burden, Complainant must prove that Respondent's stated reasons for reprimanding

[34]Nobody in specific gave Complainant this ultimatum. He references a letter that was sent to Attorney Sawyer that stated, in essence, sign this retirement form and we will drop the Notice of Proposed Removal. (TR 772)

Complainant are pretextual, **i.e.**, that they are not the true reasons for the adverse action and that the protected activity was. **Leveille v. New York Air Nat'l Guard**, 94-TSC-3/4, at p. 4 (Sec'y 12/1/95); **Hoffman v. Bossert,** 94-CAA-4, at p. 4 (Sec'y 9/19/95). It is not sufficient that Complainant establish the proffered reason was unbelievable; he must establish intentional discrimination in order to prevail. **Leveille**, **supra**.

Complainant's engagement in protected activity has been overwhelmingly established. He raised complaints both internally within his chain of command and externally to the CT DEP. The law is clear that both internal and external complaints are protected by the whistleblower statutes. **E.g. Dodd v. Polysar Latex**, 88-SWD-4 (Sec'y 9/22/94). Similarly, the evidence clearly establishes that Respondent knew of Complainant's engagement in these protected activities, as his complaints were always logged with his first line supervisor and elsewhere within his chain of command. Respondent admits to its knowledge that Complainant notified the CT DEP of the North Site. (TR 58)

Even though Respondent disagreed with Complainant's insistence about the reportability of the North Site, Respondent has not shown that Complainant's position was unreasonable. **See Generally Yellow Freight Sys. v. Reich**, 38 F.3d 76 (2d Cir. 1994) (wherein the Court held an employee need not prove the existence of an actual safety defect to have engaged in protected activity under an analogous whistleblower statute, the Surface Transportation Act); **Crow v. Noble Roman's, Inc.**, 95-CAA-8 (Sec'y 2/26/96) (the CAA protects an employee's work refusal that is based on a good faith, reasonable belief that doing the work would be unsafe or unhealthful); **Scerbo v. Consolidated Edison Co. of N.Y., Inc.**, 89-CAA-2 (Sec'y 11/13/92) (protection is not dependent upon actually proving a violation). In fact, it is well established that Complainant arrived at his recommendation that the Respondent must report the North Site based on his extensive training and experience in the environmental compliance area.[35] Furthermore, the evidence establishes that this reportability issue was far from clear cut, with Respondent's legal department "waffling" on its recommendation not to report the site (CX 19, dated 7/2/96), and Lt. Opstrup, who ultimately followed the chain of command, personally holding the opinion that the Site

[35]To this extent, the evidence regarding whether the Federal Facilities Compliance Act (FFCA), enacted in 1992, did affect whether or not the North Site was reported is moot in the context of this proceeding. Suffice it to note, however, that the testimony was that the FFCA did not affect whether or not the North Site was reported. (TR 577-578)

should have been reported as the conservative, safer route. (CX 116)

Respondent has defended itself by arguing that there was no adverse employment action taken against Complainant. To wit, Respondent argues Complainant never had "By Direction of" signature authority in the first instance, nor did he have the title of Academy Environmental Engineer. **A fortiori**, Respondent argues, any comments made by Captain Florin were not adverse because they did not negatively effect Complainant's employment.

An adverse employment action can be in the form of tangible job detriment or a hostile work environment. **Smith v. Esicorp, Inc.**, 93-ERA-16, at p. 3 (Sec'y 3/13/96). In this case, Complainant's employment was adversely affected by the August 27, 1996 "discussion" between Complainant and Captain Florin about Complainant's signature authority and his representation of himself as the Academy's Environmental Engineer. I pause to note that Captain Florin's statement, which I find had the potential of changing Complainant's responsibilities at the Academy as he had up to that time exercised them, did not actually result in a change in Complainant's employment responsibilities as alleged. This is only because of Complainant's memorandum (CX 78), authored a mere two days after the meeting, wherein Complainant asserted he considered the discussion "nonbinding."

Nevertheless, this "discussion," which this Judge finds to have been in effect a verbal counseling session, was the culmination of Complainant's pursuit of environmental compliance and clearly exhibited the degree of animus which that insistence upon compliance generated. Complainant's job undoubtedly changed for the worse post-August 27. This animus is substantiated by Complainant's colleagues, such as Lt. Opstrup and Attorney Frey, who generally testified to Complainant constantly butting heads with his chain of command regarding compliance issues. Not surprisingly, Complainant's reaction to the stress of this work situation were a variety of physical ailments requiring him to take additional sick leave and leave under the FMLA. The additional leave was subsequently determined by Respondent to be a negative factor in Complainant's ability to complete the tasks assigned to him. The result was Complainant's Notice of Proposed Removal. **See Generally Boytin**, **supra** (wherein the Secretary noted that it was not necessary to analyze the case as a hostile work environment case since the actions of the respondent caused tangible job detriment). Complainant has, therefore, established that his employment was adversely affected by Respondent's actions, albeit not in the way that he had originally claimed.

The crux of this case is whether or not Respondent's adverse actions were based upon an unlawful motive. The situation presented at the Academy is reduced to this: there was a disagreement of minds as to whether or not the law required the North Site to be reported. Complainant can prevail only by proving, by a preponderance of the evidence, that the resultant adverse actions were motivated by Complainant's insistence on environmental compliance. If Respondent's actions were merely motivated by the command's loss of trust in Complainant as an employee capable of following instruction from his superiors (CX 116, at p. 51, "nobody trusted anybody") or simply by Complainant's inability to get along with second line supervisor Carabine, Complainant has established little more than that Respondent did not have faith in him performing his duties or did not like him. However discomforting an employment situation these latter circumstances might make, they do not amount to a violation of the whistleblower statutes.

This Judge finds and concludes that Respondent's adverse actions were motivated by its disapproval of Complainant's repeated insistence on environmental compliance and his efforts to obtain that compliance. While this Judge does not fault the chain of command for its disagreement with Complainant's assessment on the reportability of the North Site and its declination to adopt his recommendations, I do find fault in the chain of command's active efforts to dissuade and/or prohibit Complainant from making a report to external regulatory authorities. Respondent was not entitled to insist that Complainant adhere to their position or keep silent about his disagreement with it. **See Generally Dutkiewicz v. Clean Harbors Environmental Services, Inc.**, 95-STA-34 (ARB 8/8/97).

Respondent is, in effect, faulting Complainant for going outside the chain of command and making a complaint to a government agency. For example, Captain Florin commented and gesticulated that Complainant had stabbed him in the back when he reported to the CT DEP despite the command's determination that the North Site need not be reported. He also testified and attested to the fact that he took issue with Complainant circumventing the chain of command. (TR 1003; CX 109) It is not permissible, however, to find fault with an employee for failing to observe established channels when making safety complaints. **Odom v. Anchor Lithkemko**, 96-WPC-1 (ARB 10/10/97). **See Also West v. Systems Applications Int'l**, 94-CAA-15 (Sec'y 4/19/95). Such restrictions on communication, the Secretary has held, would seriously undermine the purpose of the environmental whistleblower laws to protect public health and safety.

The motivation behind Captain Florin's "discussion" with Complainant cannot be seriously disputed. Proximity in time between protected activity and an adverse action is solid evidence of causation. **White v. The Osage Tribal Council**, 95-SDW-1 (ARB 8/8/97). In this case, a mere one day expired between the date on Complainant's letter to the CT DEP and the date on which he sat down with Captain Florin for a "discussion."

This Judge further finds evidence of discriminatory animus in Mr. Carabine's statements, as recounted in the deposition testimony of Lt. Opstrup, that Complainant had a secret environmental agenda and words to the effect that Complainant was an environmental zealot. (CX 116, at pp. 63-64) The Lieutenant's attempt to lessen the impact of these statements by stating that they needed to be considered in their context does little to ameliorate their evidentiary value. While Complainant's desire for environmental compliance may have been more ambitious than the Academy had bargained for, it does not justify derogatory references to secret agendas and environmental zealotry. Mr. Carabine's comments are evidence of his view that Complainant was aggressively pursuing environmental compliance and that Mr. Carabine viewed this negatively. There is also Attorney Frey's description of Mr. Carabine's attempted interference with Complainant's efforts to "get the word out" about the appropriate way to deal with hazardous materials. (TR 402)

Lt. Opstrup himself has questioned Complainant's agenda in a July 24, 1996 e-mail (CX 19), wherein he commented "his work quality is excellent, its (sic) his agenda that I'm unsure of." Lt. Opstrup has also expressed concern that Complainant might "stir" something up upon seeing a change in language on the sign that was to be posted at the North Site. (CX 19, dated July 18, 1996) There is also Commander Mackell's statements in his March 27, 1996 memorandum (CX 54) that Complainant "left the impression with [the Commander], and [he] suspects with others who were present, that the adjective 'ardent' would have been an appropriate addition" to Complainant's self-description as an environmentalist. The Commander then recommended Complainant separate his personal feelings from his official duties. Finally, there is Captain Florin's circular file drawing, which typically indicates a document is to be filed in the trash, on a September 9, 1996 announcement concerning certain environmental training courses. (CX 81)

Perhaps the most telling sign of Respondent's motivation in its action taken against Complainant Berkman is contained in a July 16, 1996 e-mail (CX 19), wherein Captain Florin wrote to Lt. Opstrup

> PLEASE KEEP THIS CLOSE HOLD. ...you need to know where the Capt is coming from so we can put the right spin on the training...don't take any of the tsuff (sic) personally (e.g. we [p]ut our foot in our mouth.) As I have seen here, it takes a long time to [t]urn aroud (sic) to do the right thing. We all belive (sic) we should have done this lon (sic) gao (sic)..but were prevented for some unknown reasons (could have been very [g]ood ones). You, TJ and I have our work cut out for us to turn it around and do [t]he right thing..but we have to arm ourselves with good data and reasoning [t]o get there..."

This e-mail speaks clearly to Respondent's motivation. In this regard, this Judge found the Captain's explanation that his reference to "putting the right spin" on training referred to correctly presenting the lead awareness training in a way that could be understood by the grounds shop to be incredible. (TR 1056) It can be more reasonably inferred that Captain Florin got an unspecified go ahead from an unspecified somebody to "turn around" the situation that had hence existed at the North Site. The Academy was in the process of turning it around and doing the right thing. Inferentially, the Academy wanted to do this on their own terms and at their own pace, maintaining positive public relations while they were at it. Complainant, whom Respondent interpreted as having his own agenda and schedule that did not comport with that of the Academy, seems to have rushed the Academy's compliance along with his August letter to CT DEP. Needless to say, the command, who had intended to "keep this close hold," was upset by Complainant involving the CT DEP.

The Board has held that evidence that an employer routinely encouraged employees to make written reports of safety defects is "highly relevant" evidence that militates against a finding of retaliatory motive. **See Andreae v. Dry Ice, Inc**. 95-STA-24 (ARB 7/17/97). Vice versa, this Judge views evidence that an employer discourages reporting compliance issues as highly relevant to a finding of retaliatory motive. In this regard, I find the credible and uncontroverted evidence that Attorney Frey was told not to contact the DEP indicative of Respondent's animus towards the environmental compliance officer resorting to external authorities in an effort to obtain compliance.

Respondent argues that it did not take issue with Complainant making the report to CT DEP, but with Complainant representing to CT DEP that the report was being made on behalf of the Academy. In this regard, this Judge notes the precedent of **Holtzclaw v. Commonwealth of Kentucky**, 95-CAA-7 (2/13/97) (holding respondent

proved it would have terminated complainant even if he had not engaged in any protected activity because of the manner in which he chose to raise his complaints, a manner which, among other things, wrongfully gave the clear impression that it represented the respondent's official position and that respondent sought formal involvement in a matter on which it had taken no position) and **Helmstetter v. Pacific Gas & Elec. Co.**, 86-SWD-2 (Sec'y 9/9/92) (holding complainant failed to prove respondent's stated reason for his discharge, that he sent a letter that misrepresented the position of the company by its 'official trappings,' was pretextual).

This Judge finds and concludes that Complainant Berkman has proven that Respondent's contention that it was solely concerned with Complainant misrepresenting the letter to CT DEP as being the Academy's official position as pretextual. First, I am so convinced because Complainant presented unrebutted testimony that he had sent letters outside of the Academy on letterhead on numerous prior occasions. Second, I am so convinced because Respondent, who was last in possession of multiple file cabinets containing Complainant's work product, failed to produce those documents at hearing. Third, and finally, while this Judge has been provided with Academy regulations pertaining to 'By Direction of' authority and 'official correspondence' (ALJ EX 9, enclosures 7 and 8), the latter of which is an ambiguous phrase, I have failed to be supplied with a particular written rule against use of Academy letterhead.

This Judge, accepting the testimony as to the existence of an office policy against external correspondence as true, nevertheless rejects violation of this policy as a valid reason for the adverse action taken against Complainant because it is not clear that Complainant was informed of this rule and, even if he was, Complainant testified he was allowed to send such external correspondence on previous occasions. This testimony was unrebutted by Respondent. As such, I cannot conclude that Complainant violated any reasonably imposed business rule.

In regards to the Notice of Proposed Removal, Respondent maintains it was premised upon Complainant's inability to fulfill the "critical" responsibilities of his position on a full-time basis. This Judge recognizes the whistleblower statutes do not restrict an employer in its operational decisions. **Bauch v. Landers**, 79-SDW-1 (Sec'y 5/10/79) (quoting the ALJ's R.D.O.). **See Also Ray v. Harrington**, 79-SDW-2 (Sec'y 7/13/79). The statutes do not, and should not, preclude management from taking steps to assure and maintain the effectiveness of its staff in enforcing a particular environmental statute and the employer should not be

faulted for mandating an adverse action, such as reassignment or termination or removal, to achieve this action.

The statutes do, however, preclude management from resisting adherence to applicable regulatory provisions and taking action to frustrate compliance. **Bauch**, **supra**. Respondent, whose actions caused Complainant's precarious mental health condition according to the uncontroverted medical evidence of record, **see infra** Part III, then seized upon Complainant's medically prescribed inability to perform his duties on a full-time basis as the grounds upon which to propose Complainant's removal.[36] **See Generally Scerbo**, **supra** (wherein the Secretary held respondent's stated reason for the adverse action was pretextual where respondent seized upon complainant's "belligerent" and "disruptive" attitude to rationalize its discriminatory transfer of complainant).

Complainant also alleges he has been subjected to retaliatory harassment, which is a violation of the applicable whistleblower statutes. **Smith**, **supra**, at p. 11; **Marien**, **supra**, at p. 4. Hostile work environment cases involve issues of the environment in which the employee works and not tangible job detriment. **Smith**, **supra**, at p. 11. For harassment to be actionable, it must be sufficiently severe or persuasive as to alter the conditions of employment and create an abusive working environment. **Id.** at pp. 4-5 (**Citing Meritor Savings Bank v. Vinson**, 477 U.S. 57, 67 (1986). **See Also English v. General Elec. Co.**, 85-ERA-2 (Sec'y 2/13/92) (in which the Secretary applied the **Meritor** decision for guidance in the case of an alleged hostile work environment in violation of an analogous whistleblower statute, the ERA). In **Harris v. Forklift Sys., Inc.**, 114 S. Ct. 367 (1993), the Supreme Court discussed some of the factors that may be weighed but emphasized that whether an environment is hostile or abusive can be determined only by looking at all the circumstances.

The Secretary has found that a complainant's own testimony that she still loves her job and hopes to remain at work

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[36]In this regard, this Judge does not find the Captain's testimony that the Academy was in environmental compliance as of January 8, 1997 to indicate that Complainant's removal was not necessary. (TR 1021) Respondent was not required to wait until such time as it fell out of compliance to replace an employee who had not been performing to appropriate standards. This Judge would have been more persuaded by evidence as to whether or not Respondent has actually replaced Complainant with a full-time employee and, if so, how quickly that was done.

contraindicates her allegation of a hostile work environment. **Marien**, **supra**, at p. 6. The typical hostile work environment detracts from an employee's job performance, discourages employees from remaining on the job, or keeps them from advancing in their careers. **Id.** (**citing Harris**, **supra**). In this case, Complainant Berkman wants reinstatement only if not supervised by Mr. Carabine, who he claims is the predominant perpetrator of hostile acts.

In order to find that Complainant was subjected to a hostile work environment, I would have to accept his contention that a number of Respondent's actions, such as the religious leave issue, Complainant's being given AWOL, and minor skirmishes such as his removal from the Tank Consolidation Project in May 1996 (TR 507, 628; CX 41; CX 64), a July 1996 incident regarding paint chips (TR 716-717; CX 65), reduced access to the Academy's computer system subsequent to August 1996 (TR 715; CX 104), and exclusion from Eaton Hall in October 1996 (TR 760) were discriminatorily motivated. The record is defunct of evidence to support such a finding and, in this respect, Complainant has failed to satisfy his burden of proving pretext. Indeed, the evidence that Mr. Carabine yelled at all employees, even persons who were not under his supervision, and the evidence that Complainant had previously contacted the Connecticut Attorney General (CX 71) and had not been reprimanded, specifically mitigate against a finding of a hostile work environment based on engagement in protected activity.

III. Damages

This Judge, having found the Respondent in violation of the aforementioned whistleblower statutes, may issue a recommendation on damages to be awarded to Complainant. Complainant requests reinstatement, cessation of the adverse personnel action, a comprehensive study of the role and position of the legal office, reinstatement of signature authority and status as environmental engineer, comprehensive study of environmental compliance and enforcement of non-compliance, comprehensive study and reconfiguration of the Academy, cessation of all harassment and other unfair treatment of Complainant, compensatory damages in the amount of $300,000.00, injunctive relief to insure that Complainant's personnel record is cleared of reference to wrong doing or poor performance and prevention of interference with Complainant's pursuit or maintenance of future employment, exemplary damages in the amount of $150,000.00, attorneys fees and costs in the amount of $63,341.65, and any and all other relief to which Complainant might be entitled. (CX 120; ALJ EX 1; ALJ EX 26) Complainant further specified at hearing that he seeks expenses for medical and lawyers' services, lost wages, and

compensation for being discredited for the suffering he went through at the Academy and that which he is still enduring. (TR 769-770)

Back Pay Liability

Back pay awards to victorious whistleblowers in DOL adjudications are to be calculated in accordance with the make whole remedial scheme embodied in §706 of Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000e **et seq.** (1988). **See Loeffler v. Frank**, 489 U.S. 549 (1988); **Polgar v. Florida Stage Lines**, 94-STA-46 (ARB 3/31/96). Uncertainties in establishing the amount of a back pay award are to be resolved against the discriminating party. **McCafferty v. Centerior Energy**, 96-ERA-6 (ARB 9/24/97).

Unless constructively discharged, Complainant Berkman is not eligible for post-resignation damages and back pay or for reinstatement/front pay. **Talbert v. Washington Public Power Supply Sys.**, 93-ERA-35, at p. 9 (ARB 9/27/96); **Nathaniel v. Westinghouse Hanford Co.**, 91-SWD-2, at p. 10 (Sec'y 2/1/95). If an employee is found to have been constructively discharged, reinstatement or front pay would be appropriate and post-resignation back pay would be allowed.

A finding of constructive discharge requires proving that the employer, rather than acting directly, deliberately makes an employee's working conditions so difficult, unpleasant, unattractive, or unsafe that an objective reasonable person would have felt compelled to resign, **i.e.**, that the resignation was involuntary.[37] **See Generally Mosley v. Carolina Power & Light Co.**, 94-ERA-23 (ARB 8/23/96) (**citing Nathaniel**, **supra**; **Johnson v. Old Dominion Security**, 86-CAA-3 (Sec'y 5/29/91). **See Also Guice-Mills v. Derwinski**, 772 F. Supp. 188 (S.D.N.Y. 1991), **aff'd**, 967 F.2d 794 (2d Cir. 1992); **Lopez v. S.B. Thomas, Inc.**, 831 F.2d 1184 (2d Cir.

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[37]I pause to note that the Secretary has adopted the majority position for determining whether or not there has been a constructive discharge. As was succinctly stated in the matter of **Hollis v. Double DD Truck Lines, Inc.**, 84-STA-13, at p. 4 (Sec'y 3/18/95), it is not necessary to show that the employer intended to force a resignation, only that he intended the employee to work in the intolerable conditions. **Cf. Martin v. Cavalier Hotel Corp.**, 48 F.3d 1343 (4th Cir. 1995) (representing the minority view that an employee must prove the actions of the employer were intended by the employer as an effort to force the employee to quit).

1987); **Talbert**, **supra**. Thus, the adverse consequences flowing from an adverse employment action generally are insufficient to substantiate a finding of constructive discharge. Rather, the presence of "aggravating factors" is required. **Nathaniel**, **supra** (**citing Clark v. Marsh**, 665 F.2d 1168, 1174 (D.C. Cir. 1981). **See Also Stetson v. Nynex Serv. Co.**, 995 F.2d 355 (2d Cir. 1993). Conceivably, a constructive discharge could occur through medical or physical inability. **Spence v. Maryland Casualty Co.**, 803 F. Supp. 649, 667 (W.D.N.Y. 1992) (reasoning that **Lopez v. S.B. Thomas, Inc.**, **supra**, does not require that a constructive discharge be demonstrated only by an affirmative resignation).

On the one hand, the Secretary has noted that circumstances sufficient to render a resignation involuntary include a pattern of discriminatory treatment and "locking" an employee into a position from which no relief seemingly can be obtained. **Johnson**, **supra**, at n. 11 (**citing Clark**, 665 F.2d at 1175; **Satterwhite v. Smith**, 744 F.2d at 1382-1383). On the other hand, it is insufficient that the employee simply feels that the quality of his work has been unfairly criticized. **Mosley**, **supra** (**citing Stetson**, 995 F.2d at 360). Furthermore, when an employee's performance is poor, "an employer's communication of the risks [of discipline for that poor performance] does not spoil the employee's decision to avoid those risks by quitting." **Id.** at p. 4 (**quoting Henn v. National Geographic Society**, 819 F.2d 824, 829-30 (7th Cir. 1987), **cert. denied**, 484 U.S. 964 (1987).

Complainant contends that he was constructively discharged by the ultimatum he was issued in January of 1998, **i.e.**, once Respondent issued Complainant the Notice of Proposed Removal, Complainant had no choice but to opt for disability retirement or be terminated. If this Judge were to accept Complainant's assertion that he was issued an ultimatum, the proper focus of the inquiry would be upon whether Complainant could prove that the issuance of the Notice of Proposed Removal, which Complainant asserts forced his decision to opt for early disability retirement, was discriminatory.[38]

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[38]This Judge has not determined whether the Notice of Proposed Removal was discriminatory because to reach that point of the analysis would presuppose that Complainant was issued an ultimatum as he contends. I pause to note, however, that Respondent contends that it issued Complainant's Notice of Proposed Removal because of his inability to perform the critical functions of his position on a full-time basis. On the one hand, Complainant's inability to work full-time, however, was nothing more than the result and manifestation of his protected

It is a fact, however, that Complainant applied for disability retirement on a date prior to the issuance of the Notice of Proposed Removal. Based on this fact, together with other circumstances of the alleged 'ultimatum' as described below, this Judge rejects Complainant's assertion that he was issued the ultimatum of taking disability retirement or being removed from his position.

This Judge is persuaded that Complainant's own actions contraindicate his claim that he was constructively discharged. Complainant applied for disability retirement on November 19, 1996, and had in fact begun the application process sometime before November 6. The Notice of Proposed Removal was not issued until January 8, 1997. Furthermore, it is a fact that Complainant did not wait for his pending administrative complaint to resolve, in this regard **see Guice-Mills**, **supra** (holding no constructive discharge where plaintiff's requested accommodation was properly denied, plaintiff rejected a reasonable offer of reassignment that would have met her medical restrictions, and plaintiff voluntarily resigned, as she had long contemplated, on disability pension without awaiting a final administrative determination of her EEOC complaint), and that this alleged ultimatum was sent to Complainant's attorney, who would presumably have advised Complainant that such an ultimatum could not legally be issued.

Complainant contends this ultimatum was issued to him by Respondent in the form of a letter sent to his attorney. (TR 772) Complainant testified he believed a letter was sent to his attorney which said "in effect, 'sign this saying you're going to get -- take your retirement disability and we'll drop the notice of proposed removal,' something to that effect, which I remember my wife speaking to someone at OPM and said that was not appropriate." (TR 772)

Although I found Complainant generally credible, this Judge does not credit Complainant's testimony in this regard. Initially,

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activity. **See Generally Dodd**, **supra** (wherein the Secretary held complainant's insubordination and poor attitude were nothing more than a manifestation of his dissatisfaction with management's commitment to environmental concerns). Complainant was under Doctor's orders to work not more than twenty (20) hours per week in the office environment because the harassment he was subjected to in that environment were the cause of his medically diagnosed major depression. On the other hand, Complainant has himself recognized that the Environmental Office is understaffed and has an overwhelming work load. (CX 47)

I note that Complainant repeatedly couched his testimony regarding the letter in terms of what the letter said "in effect." This, in combination with the fact that the letter was not offered into evidence for this Judge's impartial review to determine what it could reasonably be inferred as stating, leads me to conclude that no ultimatum was explicitly or impliedly issued. Furthermore, it is substantially noteworthy that this letter was sent to Complainant's attorney, who presumably would have advised Complainant that if Complainant's perception of the letter were correct, Respondent's ill-motivated effort to oust Complainant from his position was arguably illegal. Indeed, Complainant testified OPM informed his wife that the effect of the letter was "not appropriate."

Respondent has produced a letter dated February 13, 1997 to Attorney Sawyer. (EX 3) Assuming this is the letter to which Complainant referred in his testimony, this Judge does not find it to be an ultimatum as alleged. The letter merely complied with the procedure mandated by the Civilian Personnel Manual (CX 12), which provides that it is permissible for Respondent to inform the employee of disability retirement options, that personnel action will not be delayed because of a retirement application, and that management may inform an employee that a removal action is contemplated and that if the employee resigns before an action is proposed, no record will be made in the OPF. I cannot infer any coercion of the type prohibited by the Personnel Manual in the letter dated February 13.

Complainant's decision to discontinue his employment with Respondent was premature, in that he failed to await resolution of this administrative complaint, and/or voluntary, in that there was no ultimatum issued to him and no hostile environment to justify his vacating his position. **Cf. Spence**, 803 F. Supp. at 667 (adverse conditions in the workplace, coupled with plaintiff's reasonable conclusion that the workplace incidents were the proximate cause of his medical condition and anxiety, sufficiently showed a constructive discharge for purposes of plaintiff's **prima facie** case); **Clark v. Marsh**, 665 F.2d 1168 (D. D.C. 1981) (finding plaintiff was constructively discharged based on a continuous pattern of discriminatory treatment, encompassing deprivation of opportunities for promotion, lateral transfer, and increased educational training, which existed over a period of eleven years and despite plaintiff's qualifications, outstanding employment record, and numerous informal efforts and formal administrative charges that failed to remedy the situation); **Johnson**, **supra** (finding complainant was constructively discharged where there were repeated attempts to elicit responsible action by respondent, respondent instituted a program of inadequate response to

complainant's concerns, and respondent attempted to force upon complainant a wholly unacceptable transfer solution).

While Complainant was plainly faced with a professional environment in which he had been promised a re-structuring of the chain of command and then informed that the re-structuring would not occur, an environment in which Complainant decided his continued efforts were an exercise in futility, it remains a fact that Complainant was working under the same conditions that existed at the time he started his employment with the Academy. Complainant had worked under the conditions which he contends justify his opting for disability retirement since nearly the day he began working for Respondent. In this regard, **see Stetson**, **supra** (holding no constructive discharge where the working conditions of which plaintiff complained remained the same for three years prior to his resignation, there was never an explicit or implied suggestion that plaintiff would be terminated, and there was no reduction in plaintiff's rank or salary).

Accordingly, Complainant is entitled to neither post-resignation damages and back pay nor reinstatement or front pay. Complainant's failure to establish that he was constructively discharged is a bar to any of these remedies.

This Judge, assuming **arguendo** that Complainant were able to establish that he had been constructively discharged, has considered the remedy to which he might otherwise be entitled. Respondent bears the burden of proving that Complainant failed to mitigate his damages. To meet this burden, a respondent must establish that comparable jobs were available during the interim period and that a complainant failed to make reasonable effort to find new employment that was substantially equivalent to his or her former position and suitable to a person of his or her background and experience. **See Hoffman**, **supra** (wherein the Board held that respondent failed to meet its burden of proving that complainant failed to mitigate damages because the record lacked sufficient evidence to determine whether complainant's self-employment was a reasonable alternative to finding other employment). **See Also Padilla v. Metro-North Commuter Railroad**, 92 F.3d 117 (2d Cir. 1996), **cert. denied**, 117 S. Ct. 2453 (wherein the Court held that defendant failed to meet its burden of proving that plaintiff failed to reasonably mitigate damages because defendant failed to provide any evidence that suitable work existed for a person of plaintiff's qualifications); **Gallo v. John Powell Chevrolet, Inc.**, 779 F. Supp. 804, 813-814 (M.D. Pa. 1991), **aff'd**, 981 F.2d 1246 (3d Cir. 1992) (burden of proving that Title VII plaintiff failed to exercise reasonable diligence in seeking out other employment is on employer and that burden may be satisfied by proving that

substantially equivalent positions were available and plaintiff failed to use reasonable care and diligence in seeking those positions; plaintiff has no obligation to submit evidence of reasonable diligence on her part until defendant has established those elements).

Despite evidence that Complainant Berkman was not restricted from performing work within his field for an entity other than Respondent (TR 823) and despite evidence that Complainant opted to work uncompensated for his time everyday per week at his wife's store (TR 100, 108),[39] facts which would suggest to this Judge that Complainant showed a wilful disregard for his financial interest, thereby breaching his duty to mitigate damages, Respondent has completely failed to offer evidence of the availability of comparable positions. Because Respondent has failed to meet its clearly defined preliminary burden in regards to mitigation, this Judge is unable to proceed to the latter step of the analysis, where the aforementioned evidence would heavily weigh in favor of Respondent.

Duplicative benefits must be deducted from a back pay award. The Secretary has held that no set-off is permitted in the absence of proof that a complainant's workers' compensation benefits were designed as compensation for lost wages during the particular back pay period at issue. **Williams v. TIW Fabrication & Machining, Inc.**, 88-SWD-3 (Sec'y 6/24/92). Federal Employees Compensation Act (hereinafter FECA) payments consist of "compensation," and are defined as a percentage of the employee's monthly salary. **Nichols v. Frank**, 42 F.3d 503, 515-516 (9th Cir. 1994). Accordingly, FECA payments are properly deducted from an award of back pay. **Id.** (holding Title VII back pay award was properly set-off by FECA payments).

Mrs. Berkman testified that Complainant was earning a salary of approximately $55,000 per year while he worked for Respondent, which translates to approximately $3,000.00 biweekly. She further

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[39]Mrs. Berkman owns a store in Mystic called Seaport Imports and it sells furniture, glassware and pottery. Complainant works there, fixing furniture, from 10:00 a.m. until 6:00 p.m. about everyday per week, including Saturday and Sunday. He is not, however, paid for his services.

No doctor, as far as Complainant knows, has ever indicated that he could not do forty hours of work per week. (TR 823) The Doctor informed Complainant he could not do forty hours at the Academy because that is the environment that caused his illness. (TR 823)

testified that Complainant was earning approximately $2,000.00 per month at the time of hearing. (TR 100) Assumedly, this is a reference to his FECA benefits because, as far as this Judge was informed, Complainant was not receiving income from any other source at that time. Although the mathematical inaccuracy of these numbers is at once apparent, Respondent did not question the amounts as sworn to by Mrs. Berkman. These numbers are, therefore, the numbers upon which any back pay award should be based. Complainant testified he will receive sixty percent (60%) of the salary he made while at Respondent during his first year after retirement and about forty percent (40%) per year thereafter under FECA. (TR 757)

Accordingly, in the event that a reviewing authority determines that Complainant was constructively discharged, this Judge would recommend Complainant be awarded back pay from February 14, 1997, the date he was last employed by Respondent, until the date of final judgment, **Doyle v. Hydro Nuclear Services**, 89-ERA-22 (ARB 11/26/97), together with interest calculated in accordance with 26 U.S.C. §6621 on that award. The back pay should be in the amount of $1,000.00 per month ($3,000.00 less $2,000.00) for the first year following Complainant's last date of employment and in the amount of $1,800.00 per month ($3,000.00 less 40%) for as many years thereafter until date of final judgment in this matter.

Reinstatement/Front Pay

As previously noted, this Judge has determined that Complainant is not entitled to an award of reinstatement or front pay because he was not constructively discharged. Nevertheless, I issue a recommendation as to this remedy for the benefit of reviewing authorities who might otherwise disagree with this holding. Complainant, who was 46 years old at the time of hearing and who states he enjoys working and would work into his sixties, definitely wants his job back. In this regard, he noted he has invested a lot of time and money in his education.

It is plain that despite Complainant's expressed desire for reinstatement, such remedy is not possible under the peculiar facts of this case. Initially, Complainant's diagnosed major depression and medically imposed work restriction clearly bar an immediate reinstatement. (CX 119) In this regard, this Judge relies upon the recent precedent of **Michaud v. BSP Transport**, 95-STA-29, (ARB 10/9/97) and recommends Complainant be awarded front pay in the amount of $1,800.00 per month ($3,000.00 less 40%) for one year from the final judgment in this matter. This one year period of front pay more than adequately compensates Complainant, whom Dr. Okasha predicted would see a significant improvement in his

condition once he was not subjected to the work environment at the Academy and whom APRN Rasie predicted a recovery for once he was removed from his stressors.

The issue remains as to whether Complainant is entitled to reinstatement once he gets his health back. (TR 770) I note, however, that Complainant Berkman wants reinstatement only if not supervised by Mr. Carabine, whom he contends is the predominant perpetrator of hostile acts. To this end, Complainant proposes a reorganization of the Academy.

This Judge declines to award front pay, rather than reinstatement, despite the evidence of record that the work environment at the Academy is the cause of Complainant's major depression and severe anxiety and despite the evidence that he will not recover from these conditions so long as he is in that environment. I reach this determination upon considering the fact that Complainant himself has specifically requested reinstatement, rather than contending that he does not believe he can ever return to the Academy, and because the various medical documents do not indicate that Complainant is forever incapable of functioning healthfully at the Academy.

While this Judge is empowered to fashion such equitable relief as is consistent with the remedial purposes of the various statutes, it would be beyond that authority to order a complete restructuring of the environmental compliance program at the Academy. There may be better, more effective means of conducting environmental business at the Academy, but this Judge is not the authority to issue such a mandate. Instead, I can fashion the more appropriate remedy of ordering reinstatement to Complainant's position, with the same terms, conditions and privileges of employment as he previously enjoyed, and a stern reminder to Academy officials that they are legally obligated to conduct themselves in a manner that does not violate the whistleblower statutes. Clearly, none of the parties want to revisit a similar suit on another date.

Compensatory Damages

Pursuant to the whistleblower statutes, compensatory damages may be awarded for emotional pain and suffering, mental anguish, embarrassment and humiliation. **See Generally Nolan v. AC Express**, 92-STA-37 (Sec'y 1/17/95) (analogous provision of the STA); **Deford v. Secretary of Labor**, 700 F.2d 281, 283 (6th Cir. 1983) (analogous provision of the ERA). Where appropriate, a complainant may recover an award for emotional distress when his or her mental anguish is the proximate result of respondent's unlawful

discriminatory conduct. **See Bigham v. Guaranteed Overnight Delivery**, 95-STA-37 (ALJ 5/8/96) (adopted by ARB 9/5/96); **Crow**, **supra**. **See Also Blackburn v. Metric Constructors, Inc.**, 86-ERA-4 (Sec'y 10/30/91). Complainant bears the burden of proving the existence and magnitude of any such injuries; although, as a caveat, it should be noted that medical or psychiatric expert testimony on this point is not required. **Bigham**, 95-STA-37 (ALJ 5/8/96), at p. 14; **Lederhaus v. Paschen**, 91-ERA-13 (Sec'y 10/26/92), at p. 7 (Citation Omitted).

The Board has found it appropriate to review other types of wrongful termination cases, as well as awards in other whistleblower decisions involving emotional distress, to assist in the analysis of the appropriate measure of compensatory damages in whistleblower cases. Accordingly, this is precisely what this Judge has done. In particular, this Judge relies upon the Board's recent decision in **Michaud, supra**, at p. 9 (wherein the Board adopted this ALJ's recommendation of $75,000 in compensatory damages and the reasons therefor).

Complainant visited Jonathan Kay, M.D., a rheumatologist at Leahy Clinic, on April 28, 1995 for his rheumatism problem called fibromyalgia. (TR 602; CX 55) Complainant, who was diagnosed with major depression that day, testified that the depression was not affecting his work at that time. (CX 55; TR 774-775) According to Complainant, he was shocked by this diagnosis because he was very happy when his daughter was born. The Doctor indicated the depression may be related to Complainant's generalized pain from the fibromyalgia. (TR 776) Complainant indicated that there was a lot of stress from work at that point with a day care environmental compliance issue and his duties being curtailed. (TR 603) Complainant notes that he did not have any of the symptoms in 1995 that he later had (TR 821), that he did not require any medication between that date and April 1996, (TR 821) and that he did not seek additional medical treatment for the depression until April 1996. On April 10, 1996 Dr. Robert Earl Levin, Rheumatologist, excused Complainant from work due to a debilitating generalized pain syndrome associated with significant dysphoria. (CX 57)

On May 2, 1996, Complainant exercised his rights under the Family and Medical Leave Act (FMLA) and was excused from work until May 9, the day on which he was scheduled to see a psychiatrist. (CX 60) The diagnosis was dysphoria/depression, myalgia. Once Complainant was on a four hour work day schedule, the Doctor never again indicated he was fit to return to a forty hour work week at the Academy. His Doctor indicated he could return to a forty hour work week schedule if he was allowed to do part of the work outside

the office. (TR 777)

Complainant was again diagnosed with major depression by Dr. M.S. Okasha of Norwich, Connecticut on April 30, 1996. (CX 61; TR 564, 701) Complainant related to the Doctor everything that was occurring in his life at that time and the Doctor indicated the primary cause of the stress was the supervisor harassment at the Academy. (TR 772) Complainant testified at hearing that he "needed help." (TR 700) The Doctor, in a June 4, 1996 letter, states

> [Complainant] shows signs of depression in the form of tiredness, lack of ambition and motivation, hypersomnia, generalized pain, anhedonia, and lack of concentration. Typically his depression is in the morning and made worse because of the stress caused by harassment from his supervisors leading to his inability to get up and get started.

The Doctor also noted Complainant was being treated with Doxepin and weekly psychotherapy.

A report authored by Dr. Okasha on or about November 19, 1996, indicates Complainant first received treatment for his depression in April 1996 when he started on Doxepin. This medication was discontinued due to extreme fatigue and side effects, and Prozac was initiated in August 1996. Weekly psychotherapy was continued throughout. (CX 101) The Doctor wrote, "Full or partial recovery is not expected under the current circumstances at his job." No improvement is noted by Dr. Okasha "over the course of 20 weekly sessions of psychotherapy and being limited to part time work of no more than 20 hours per week." The Doctor further stated

> The patient will definitely suffer incapacity because of his medical condition which is precipitated by the situation at work. Given the stress and harassment the patient is experiencing at work this situation will lead to the worsening of the patients anxiety and depression. I have recommended that the patient work part-time to lessen the severe stress that is engendered by the situation at work which has already caused severe anxiety, extreme fatigue, poor concentration, insomnia, poor appetite and depressed mood...

(CX 101)

Complainant has experienced low mental energy, poor memory, and anxiety due to his depression. Complainant testified that he

mentally tires easily and that it was, in fact, a very exhausting experience just for him to sit and listen at hearing. (TR 564-565) He also suffers from anxiety attacks, which result in chest pains and shortness of breath. Complainant stated the attacks occurred on a regular basis and were due to the stress he was under at work. Dr. Okasha confirmed that they were anxiety attacks and proscribed Prozac.

APRN Sylvia Rasie's notes (CX 117) indicate she initially evaluated Complainant on July 8, 1997 and that he was subsequently seen by her on July 21, August 5, and August 27. APRN Rasie, by report dated October 30, 1997, indicates Complainant had switched his medication from Prozac to Serzone, an antidepressant that targets anxiety. Subsequently, he stopped treatment with the Serzone and was prescribed Klonopin, an anti-anxiety medication. APRN Rasie wrote

> [Complainant] continues to suffer from Major Depression and severe anxiety. He continues with disrupted sleep, irritability, anhedonia and decreased energy and concentration. His anxiety attacks occur approximately 4 times a week and are particularly severe when he has to deal with court proceedings. It is hoped that with a discontinuation of his stressors, or at least an amelioration, and ongoing treatment, he will recover from his depressive state. However, it is my opinion that he is unable to concentrate sufficiently to work at this time.

(CX 119)

The extent of Complainant's emotional distress is illustrated by Lt. Opstrup's testimony, during which he described a time when he felt stressed as the environmental office chief because of the amount of responsibility and the tension between his engineer and his management. He described a very painful experience, a frustrating time, and stated his sleep was probably affected. (TR 487, 490)

According to Complainant, there was no stress injected by his personal life. (TR 773, 821) The only stress in his personal life was caused by the fact that his medical condition made Complainant hard to get along with.

Complainant feels the newspaper articles, which he believes did not tell the truth, have discredited him and harmed his reputation. (TR 609) The articles upset Complainant because they were untruthful and were blaming everything on him. Complainant believes those articles may result in a potential employer

questioning his abilities when he applies for a job in the future. (TR 610) (See Generally CX 16; CX 16a) Of course the purported amount of distress these articles allegedly caused Complainant is somewhat mitigated by Complainant's own admission that he has not even begun to look for work in his field.

Mrs. Suzanne Berkman, Complainant's wife since 1989 and mother of his two daughters, one of which was six weeks old at the time of hearing, (TR 65), has a bachelor degree in chemistry and a bachelor degree in chemical engineering. In addition, Mrs. Berkman regularly takes courses in environmental matters to maintain her certifications as well as to obtain her masters in environmental science. (TR 66) Mrs. Berkman has been employed as the environmental director at the U.S. Naval Submarine Base in Groton, Connecticut since January 1993 and she has been contacted by Respondent at different times for an interpretation of a regulation or about training. (TR 81) Her husband has informed her that he is responsible for environmental compliance at the Academy and Mrs. Berkman states that his environmental responsibilities are similar to hers.

Mrs. Berkman described Complainant's personality prior to working at the Academy as "very happy." She further stated that he was "a loving person, affectionate, very enthusiastic about his job, his work, very energetic, pursued his hobbies…,did a lot of yard work,…" (TR 71) She described Complainant in his professional career as initially enthusiastic and one who initiated new instructions/management plans. The couple would often talk about Complainant's new ideas, Complainant soliciting Mrs. Berkman's input. When Complainant was first at the Academy, he took pride in his work, bringing it home for his wife to see. (TR 101) Later in time, however, he stopped producing as many documents because he was "squelched"[40] by management. (TR 102)

Mrs. Berkman noticed a change in her husband's personality during the time he was employed by Respondent and, more specifically, roundabout early 1995, the time that his immediate supervisor changed from Lt. Ingalsbe to Lt. Opstrup and to Captain Florin. (TR 80-81, 105) She stated Complainant "became very inactive, seeming to not enjoy his work really anymore, memory loss

[40]In regards to her testimony that her husband's work was squelched, she stated an ex-supervisor, Lt. Ingalsbe, told Complainant that he was no longer responsible and that he was only to focus on a particular program and no longer do other things. (TR 109) According to Mrs. Berkman, this squelching was frequent (TR 112) and there were oft times that Complainant would go to do something and be told not to do it.

actually, not remembering appointments and dates, people's names even, inpatient (sic), tired. He would wake up frequently during the night, wasn't able to really sleep well." (TR 75) At the time of the hearing, Mrs. Berkman described a lot of inactivity and television watching on her husband's part. (TR 75) Despite this "remarkable" change, Mrs. Berkman never spoke with a Doctor about her husband. Mrs. Berkman also described a changed marital relationship. She described their relationship as stressed, with very little communication because of her husband's impatience. She also described him as less affectionate. Prior to Complainant's employment at Respondent, the marital relationship had been more affectionate, outgoing, energetic and active.

Mrs. Berkman testified that her husband informed her that the root of these changes was the stress at work. (TR 76) This stress, Complainant informed his wife, was caused by noncompliance by the Respondent, Complainant's lack of support by management, and his harassment. All of which were exasperated by his feeling that there was the potential that he was personally liable for the noncompliance at the facility. Complainant and his wife discussed his potential personal liability and saw it as a "very real threat that someone could go to jail or…get seriously in trouble with the regulators." (TR 77-78) This perceived threat of personal liability was no doubt worsened by the Berkmans' review and interpretation of certain legal precedent. (CX 20; TR 84-87) Lt. Ingalsbe also testified it is true that environmental compliance issues carry personal liability. (TR 978)

The evidence establishes that Lt. Opstrup and Complainant also talked about personal liability often and that Complainant expressed fears about that accountability. (TR 497-498) In fact, personal liability and the North Site caused Lt. Opstrup stress because of the conflicting reports he was receiving from the legal department and Complainant. (TR 500) According to Complainant, a July 2, 1996 memorandum (CX 19) from Lt. Opstrup to Captain Florin, with a copy to Mr. Carabine, was prompted by Lt. Opstrup "getting very nervous," he was "very stressed out about the" North Site situation. (TR 708)

Mrs. Berkman recalled that she and Complainant discussed an issue of a site facility where waste had been discarded and there was data showing lead contamination, inferentially a reference to the North Site. Mrs. Berkman encouraged Complainant to report the site and discussed the potential consequences of him failing to do so. (TR 84) "It was very real to us that something could happen to him regarding this site" (TR 85) based upon Mrs. Berkman's experiences in her own job and upon training she had attended.

Mrs. Berkman has experienced stress because she has to deal

with someone who is so impatient and does not really seem interested in conversation. (TR 88) She also stated the marriage has changed "somewhat," mainly through the communication and lack of affection. (TR 88) Upon returning from a short court recess, Mrs. Berkman testified the marriage was changed "somewhat seriously, significantly" (TR 94) and added that she has lived in fear of her husband going to jail.

Complainant expressed to Mrs. Berkman relief that he had to report the North Site and there were times that he may have waffled a bit, but he felt very inclined that he needed to. (TR 98) He wanted to report it mainly because of the liability and to some extent a concern that there was contamination there, which could be harming the environment.

Mrs. Berkman's testimony regarding the impact of Respondent's conduct, and her husband's mental health caused by that conduct, on the marital relationship should be taken with the proverbial grain of salt. On the one hand, we have testimony from two very interested parties, Complainant and his wife, to the effect that Complainant has become non-responsive to his wife and that he does not really communicate with her. (TR 822) Indeed, Mrs. Berkman was very forthright in her bias based on her relationship with her husband and resentment at what Respondent did to him. On the other hand, at the time of hearing the Berkmans were proud parents of a six week old daughter who was in the courtroom with them.

Complainant has requested reasonable compensatory damages for Mrs. Berkman's loss of consortium. (CX 120) A loss of consortium claim is a separate, independent cause of action which accrues to the benefit of a spouse, who is a plaintiff in his or her own right. This Judge, who is an administrative judge with jurisdiction clearly circumscribed by particular statutes, is not empowered to adjudicate such a claim. Any loss of consortium to Mrs. Berkman is not a remedy permitted by the whistleblower statutes, which permit recovery for compensatory damages only for the complainant.

Mr. Carey testified he saw Complainant three or four times a year during 1994-1995 and Complainant was always upbeat and "very outgoing and just bubbling with enthusiasm." (TR 179) From March 1996 and continuing, Mr. Carey saw Complainant ten or twelve times. (TR 127, 170) This is the period during which he noticed a change in Complainant. He described Complainant as nervous, downtrodden and "obviously stressed out." (TR 127-128, 171) The nervousness was exhibited by the fact that Complainant would walk with his head down to the ground and he almost shook. (TR 179, 191) On one occasion in the fall of 1996, Mr. Carey invited Complainant to come to his house to talk with him, Mr. Adams and Mr. Marek about the

North Site. Mr. Carey's wife was at the house and was “amazed” at how nervous Complainant was. (TR 180) Mr. Carey does not know what caused this change in Complainant's personality and is not aware of what, if any, medication Complainant was ingesting. (TR 182)

Mr. Adams described Complainant as a nice guy, who was very knowledgeable and conducted himself rather well. (TR 200) Mr. Adams noticed a change in Complainant, however, at the last hazardous material meeting, where Complainant was acting like he was going to get in trouble for telling the shop that there was “stuff there.” (TR 211) Mr. Adams also stated he saw Complainant after that meeting and that he was not very talkative, he was moping around, and he looked tired and sad. (TR 212, 214-215)

Mr. Marek described Complainant's personality at the time of the first HAZMAT training as “up and up,” “really enthused.” (TR 278) Complainant appeared “uptight” to Mr. Marek during the May 1996 shop meeting, and Mr. Marek noted that Complainant looked at the floor while he spoke. (TR 286, 316) Mr. Marek commented to Mr. Carey that Complainant looked “bad”. (TR 286) Complainant seemed like he was tired, he was “slow in his speech,” and he hesitated a lot in discussing the issue of the North Site. (TR 293) After April of 1996, Mr. Marek described Complainant as not being with the program, he seemed to have lost interest. (TR 293) Mr. Marek does not know for a fact what caused these changes. (TR 316)

Ms. Campbell described Complainant as very positive and very dedicated to his job, although nobody wanted to hear what he had to say. (TR 865) Ms. Campbell described that Complainant wore out, he was tired just coming up the stairs, he did not have the positive attitude anymore. (TR 865) He was defeated about the end of 1995, beginning of 1996. (TR 865, 893)

Only Lt. Ingalsbe, who testified that Complainant was very enthused about his work when he began at the Academy, stated that he did not notice any changes in Complainant prior to the time that the Lieutenant left the Academy. (TR 983-984)

In view of the foregoing, I find and conclude that a compensatory damage award in the amount of $70,000.00 is warranted. This award is premised upon Complainant's clinical diagnosis of major depression, which is sufficiently severe to necessitate treatment with medication with adverse side effects and weekly therapy, and that condition's physical manifestations in Complainant, specifically his frequent anxiety attacks. The award is also premised upon the severity of impact that Respondent's action had on Complainant's day to day character prior to his last

day of employment, changing him from an outgoing and pleasant gentleman to a defeated and downtrodden individual; from a professional working in his field of experience to a store clerk working with little responsibility; and from an employee who took pride in his work to an employee who performed his duties in fear of personal liability.

Attorney's Fee

In calculating attorney fees under the whistleblower statutes, it is usual to use the lodestar method which requires multiplying the number of hours reasonably expended in bringing the litigation by a reasonable hourly rate. In this regard, **see generally Clay v. Castle Coal and Oil Co., Inc.**, 90-STA-37 (6/3/94), at p. 4. The fee petition must be based on records providing details of specific activity taken by counsel and indicating the date, time and duration necessary to accomplish the specific activity. **Sutherland v. Spray Sys. Envtl.**, 95-CAA-1 (ARB 7/9/96); **West v. Sys. Applications Int'l**, 94-CAA-15 (Sec'y 4/19/95). In addition to an attorney's fee for services, a successful complainant is entitled to reimbursement of the costs in bringing and prosecuting the complaint. **Hoffman**, **supra**, at p. 5.

Complainant requests a fee in the amount of $63,341.65, which is identified as attorneys' fees, deposition transcripts and hearing transcripts. Initially, I will note that the fee petition fails to adequately identify the date, time and duration necessary to accomplish the activities identified. Attorney Sawyer generally identifies a conglomerate of services performed, grouped by month; he later identifies dates on which services were provided; and he later identifies the amount of time expended. The amount of time expended does not always match up to the date the services were provided and the services identified do not match up to the date on which services were provided. If this summary of the fee petition is confusing, the fee petition itself is even more so. I also note that Complainant testified that the organization Public Employees for Environmental Responsibility (PEER) is paying his costs associated with this litigation (TR 782) and that Complainant's attorney stipulated that PEER paid for depositions and nothing else. (TR 783)

Nevertheless, Respondent has failed to submit a response to the Complainant's fee petition, despite the fact that this Judge specifically allowed fourteen (14) days from Respondent's receipt of Complainant's brief for Respondent to file a reply to the damages requested. (TR 1099) Accordingly, sans objection from Respondent, this Judge recommends Complainant's fee petition be allowed en toto.

Exemplary Damages

Exemplary damages, which serve to punish wanton or reckless conduct to deter such conduct in the future, are permitted by only one of the statutes pursuant to which Complainant has filed his claim, the TSC, 15 U.S.C. §2622(2)(B). Complainant has requested $150,000.00 in exemplary damages.

The Secretary has employed a two-step analysis in determining the appropriateness of an award of exemplary damages. **See Johnson v. Old Dominion Security**, 86-CAA-3, at pp. 16-17 (Sec'y 5/29/91). Initially, the inquiry focuses upon the wrongdoer's "intent" and "resolve," **i.e.**, whether the wrongdoer demonstrated reckless or callous indifference to the legally protected rights of others and whether the wrongdoer engaged in conscious action in deliberate disregard of those rights. **Id.** (denying exemplary damages because respondent's actions, although they manifested indifference to the public health purposes of the statute, did not rise to reckless or callous conduct); **Willy v. Coastal Corp.**, 85-CAA-1 (ALJ 5/8/97) (denying exemplary damages because respondent's conduct, which was motivated by both valid and retaliatory reasons, did not rise to that which could be considered a reckless or callous disregard of complainant's rights); **Jenkins v. U.S. EPA**, 92-CAA-6, at p. 12 (Sec'y 5/18/94) (rejecting ALJ's recommendation of exemplary damages because the evidence did not reveal the requisite state of mind even though respondent, on more than one occasion, punished whistleblowers and then carefully scrutinized complainant's actions to find a legitimate basis for its retaliation). The inquiry then proceeds to whether an exemplary award is necessary for deterrence. **White**, **supra** (denying exemplary damages where respondent acted with blatant and obvious discrimination because the purpose of the Act could be served without resorting to punitive measures and because the respondent was operating, although wrongfully, under the assumption that it was not subject to the applicable whistleblower statute). Generally, a bare statutory violated is insufficient to substantiate such an award. **Johnson**, **supra**, at p. 17 (**Citing Guzman v. Wester State Bank of Devils Lake**, 540 F.2d 948, 953 (8th Cir. 1976)).

I find nothing in this record to support a conclusion that Respondent acted recklessly or callously and in deliberate disregard of Complainant's rights. Respondent expected Complainant to follow the orders as delivered by the command. While it turns out that Respondent could not legally insist upon this type of action, there is nothing which indicates that Respondent manifested the requisite intent or resolve that is required for exemplary damages. As such, it is not necessary to proceed to an inquiry as

to whether or not exemplary damages are needed for their deterrent effect.

Request for Sanctions

Both parties have requested sanctions against each other for the failure to conduct the depositions of Complainant and Captain Florin on August 13, 1997. (EX 11; CX 120) This Judge, having reviewed the arguments of both parties, has decided that sanctions are not appropriate in this situation that I will assume was caused by nothing more than innocent miscommunication.

IV. RECOMMENDED ORDER

Based upon the foregoing findings of fact, conclusions of law and upon the entire record, I **RECOMMEND** Complainant Berkman be awarded the following remedy:[41]

1) remuneration for the cost of obtaining medical treatment and medications for his diagnosed major depression caused by Respondent's wrongful conduct;

2) compensatory damages in the amount of $70,000.00;

3) attorneys fees in the amount of $63,341.65.

It is **FURTHER RECOMMENDED** that

4) Respondent shall immediately expunge Complainant's personnel file of the Notice of Proposed Removal and any other negative reference relative to his protected activity;

5) Respondent shall post a written notice in a centrally located area frequented by most, if not all, of Respondent's employees for a period of thirty (30) days, advising its employees that the disciplinary action taken against Complainant has been expunged from his personnel record and that Complainant's complaint has been decided in his favor.

_____

DAVID W. DI NARDI
Administrative Law Judge

NOTICE: This Recommended Decision and Order and the administrative file in this matter will be forwarded for review to the Administrative Review Board, U.S. Department of Labor, Frances Perkins Building, Room S-4309, 200 Constitution Avenue, NW, Washington D.C. 20210. The Administrative Review Board is the

[41]In the event that reviewing authorities are of the opinion that Complainant was constructively discharged, a finding which this Judge specifically rejects, I would recommend (1) back pay as specified at p. 44 of this Recommended Decision and Order; and (2) reinstatement to the position of Environmental Engineer, GS-819-12, with the same terms, privileges and conditions of employment as previously enjoyed.

authority vested with the responsibility of rendering a final decision in this matter in accordance with 29 C.F.R. Part 24.6, pursuant to Secretary’s Order 2-96, 61 Federal Register 19978 (May 3, 1996).

Boston, Massachusetts
DWD:jw